EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

o. 85-6790-CFH
tatus: GRANTED

Title: Waldo E. Granberry, Petitioner
v.
Jim W. Greer, Warden

ocketed:
pril 22, 1986

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Eisenberg, Howard B.

Counsel for respondent: Rotert, Mark L.

ntry	Date	Note	Proceedings and Orders
1	Apr 22 1986	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 26 1986		DISTRIBUTED. June 12, 1986
5	Jun 2 1986		Order extending time to file response to petition until June 13, 1986.
6	Jun 11 1986	P	Response requested.
7	Jun 16 1986		Brief of respondent Larry Mizell in opposition filed.
8	Jun 25 1986		REDISTRIBUTED. September 29, 1986
9	Aug 18 1986	X	Supplemental brief of petitioner Waldo E. Granberry filed.
11	Oct 6 1986		Petition GRANTED. Justice Scalia OUT.
			**********
12	Oct 10 1986	G	Motion of petitioner for appointment of counsel filed.
13	Oct 20 1986		Motion for appointment of counsel GRANTED and it is ordered that Howard B. Eisenberg, Esquire, of Carbondale, Illinois, is appointed to serve as counsel for the petitioner in this case.
14	Nov 7 1986		Joint appendix filed.
15	Nov 18 1986		Brief of petitioner Waldo E. Granberry filed.
16	Nov 20 1986		Lodging received.
17	Nov 26 1986		Record filed.
19	Dec 17 1986		Order extending time to file brief of respondent on the merits until January 2, 1987.
20	Dec 19 1986		SET FOR ARGUMENT. Tuesday, February 24, 1987. (4th case).
22	Jan 2 1987		Brief of respondent Larry Mizell filed.
23	Jan 5 1987		CIRCULATED.
24	Feb 5 1987	X	Reply brief of petitioner Waldo E. Granberry filed.
25	Feb 24 1987		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-6790

WALDO GRANBERRY,

Petitioner,

vs.

LARRY NIZELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HOWARD B. EISENBERG

Legal Clinic
Southern Illinois University
School of Law
104 Lesar Law Building
Carbondale, IL 62901

(618) 536-4423

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITY

TABLE OF AUTHORITIES
Continued

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

WALDO GRANBERRY,

Petitioner,

vs.

LARRY MIZELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Waldo Granberry, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered herein on December 26, 1985.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit entered on December 26, 1985, is reported as Granberry v. Mizell, 780 F.2d 14 (7th Cir. 1985). The order denying the Petition for Rehearing is unreported. The Memorandum and Order entered by the District Court on April 18, 1984 is not reported. Each of the decisions is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The original habeas corpus petition was filed pursuant to 28 U.S.C. §§2241 and 2254. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 26, 1985. The petition for rehearing and suggestion for rehearing in banc was denied on February 28, 1986. This petition for certiorari is filed within ninety (90) days of that date, vesting jurisdiction in this Court pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the state's failure to raise the issue of non-exhaustion of state court remedies in the District Court foreclose consideration of that issue on appeal in a federal habeas corpus petition brought by a state prisoner pursuant to 28 U.S.C. §2254?

2. Did Petitioner exhaust his state remedies by presenting the issue raised in the federal petition to the Illinois Supreme Court and, in any event, would further recourse to the Illinois state courts be futile?

STATEMENT OF FACTS

Petitioner, Waldo Granberry, a resident of an Illinois correctional institution, brought this habeas corpus action pursuant to 28 U.S.C. §2254 in the United States District Court for the Southern District of Illinois. Petitioner claimed that the State of Illinois violated his constitutional rights by the application to his case of parole criteria adopted subsequent to his conviction. Prior to seeking federal relief, Petitioner filed a mandamus action in the Illinois Supreme Court raising the identical issue. That Court denied the petition "without prejudice to proceeding in any appropriate circuit court for consideration of the question presented." Petitioner sought no further relief in the Illinois courts and brought this federal habeas corpus claim.

Respondent raised no exhaustion question in the District Court, and the petition was denied on the merits. On appeal, Respondent for the first time in its brief, argued that Petitioner failed to exhaust his state court remedies. Petitioner responded by relying on earlier decisions of the United States Court of Appeals for the Seventh Circuit holding that the failure to raise exhaustion in the District Court constituted waiver of the issue.

The panel, specifically disagreeing with recent Seventh Circuit precedent and with recent decisions of three other circuits, decided that (1) the Illinois Attorney General could not waive the exhaustion issue; and (2) Petitioner had not, in fact, exhausted his state court remedies. The panel thus remanded the case to the District Court with direction to dismiss the petition for failure to exhaust state court remedies. Petitioner then filed a Petition for Rehearing and Suggestion for Rehearing in Banc. That Petition was denied. This Petition for Certiorari to the United States Court of Appeals follows.

REASONS FOR GRANTING WRIT

I

THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO RESOLVE AN ISSUE WHICH HAS SPLIT THE CIRCUITS AND THEREBY OBVIATE THE NEED FOR SUBSTANTIAL ADDITIONAL LITIGATION IN THE FUTURE

Pursuant to 28 U.S.C. §2254(b) (1976), a state prisoner must exhaust available state court remedies before seeking a habeas corpus writ in federal court. The Courts of Appeal are split on the issue of whether a state may waive the exhaustion requirement in a federal habeas corpus proceeding. The United States Courts of Appeal for the Fourth, Fifth, Eighth and Eleventh Circuits have ruled that the state may waive non-exhaustion, Jenkins v. Fitzberger, 440 F.2d 1188, 1189 (4th Cir. 1971); McGee v. Estelle, 722 F.2d 1206 (5th Cir. 1984) (in banc); Purnell v. Missouri Dept. of Corrections, 753 F.2d 703, 708-710 (8th Cir. 1985); Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983), cert. denied, 466 U.S. 962 (1984). The Courts of Appeal for the First, Third, Sixth and Ninth Circuits have precluded waiver, Peidel v. Scafati, 412 F.2d 761, 766 (1st Cir. 1969), cert. denied, 396 U.S. 861 (1969); United States ex rel. Trantino v. Hatrack, 563 F.2d 86, 96-98 (3rd Cir. 1977), cert. denied, 435 U.S. 928 (1978); Bowen v. Tennessee, 698 F.2d 241, 242-243 (6th Cir. 1983) (en banc); Batchelor v. Cupp, 693 F.2d 859, 962 (9th Cir. 1982), cert denied, 463 U.S. 1212 (1983). The Tenth Circuit held in Naranjo v. Richelts, 696 F.2d 83, 87 (10th Cir. 1982) that the state could not concede exhaustion. The position of the Second Circuit is unclear. In United States ex rel. Foster v. Festa, 513 F.2d 1313, 1314 n.1 (2nd Cir. 1975), cert. denied, 423 U.S. 841 (1975), the court indicated that the exhaustion requirement could not be waived. But in Colon v. Fogg, 603 F.2d 403, 407 (2nd Cir. 1979), the state's untimely attempt to raise the exhaustion issue was rejected as "close to frivolous." In the Seventh Circuit, the Granberry panel

sought to "disassociate" itself from the precedent holding that exhaustion may be waived, Heirens v. Mizell, 729 F.2d 449, 457 (7th Cir. 1984), cert. den., 83 L.Ed.2d 85, 105 S.Ct. 147 (1984).

With such an equal recent division among the Circuits, this is the type of issue which demands consideration by this Court. Without such consideration, the issue of whether a state may waive exhaustion will continue to consume the time of the federal bench. Furthermore, due to the importance of the federal question and the substantial number of federal habeas corpus proceedings brought each year by state prisoners, a uniform rule throughout the country is needed.

II

THE COURT OF APPEAL'S CONSIDERATION OF THE ISSUE PRESENTED WAS INADEQUATE AND INCORRECT

A. THE SEVENTH CIRCUIT'S DECISION IS NOT CONSISTENT WITH THIS COURT'S DECISION IN ROSE v. LUNDY

Petitioner respectfully submits that the Seventh Circuit in this case reached the incorrect decision on the question and misapplied this Court's decision in Rose v. Lundy, 455 U.S. 509 (1982). In Rose, the Court adopted a "total exhaustion" rule which requires a district court to dismiss a federal habeas petition filed by a state prisoner if it contains both exhausted and unexhausted claims. The issue of waiver was not presented nor decided in Rose.

In the instant case, the Seventh Circuit concluded that Rose required a court to consider the exhaustion issue sua sponte. Nowhere in Rose is there such a requirement or suggestion. Indeed, the Fifth Circuit setting in banc, joined the Eleventh Circuit in concluding that Rose did not preclude waiver and, in fact, that allowing the state's attorney general to waive exhaustion was most consistent with this Court's reasoning in Rose, McGee v. Estelle, 722 F.2d 1206, 1212 (5th Cir. 1984) (en banc); Thompson v. Wainwright, 714

F.2d 1495, 1505 (11th Cir. 1983). All that Rose v. Lundy requires is that the state should have an initial opportunity to pass upon the alleged violation of constitutional rights. The State of Illinois, through its chief legal officer, the Attorney General, has waived this opportunity by failing to raise the issue of non-exhaustion before the case was decided on its merits in the District Court.

B. THE EXHAUSTION REQUIREMENT IS NON-JURISDICTIONAL

Exhaustion of available state court remedies is not a jurisdictional requirement; it is merely a matter of comity, Preiser v. Rodriguez, 411 U.S. 475, 491 (1973) ("rule of exhaustion...is rooted in consideration of federal-state comity"); Fay v. Noia, 372 U.S. 391, 419-420 (1963), Bowen v. Johnston, 306 U.S. 19, 27 (1939). See also C. Wright, A. Miller and E. Cooper, 17 Federal Practice and Procedure, §4264 at p. 651 and n. 59 (1978). As Judge Tate recognized in Bufalino v. Reno, 613 F.2d 568, 570 (5th Cir. 1980): "The exhaustion rule does not relate to the jurisdiction of federal courts but rather addresses the appropriate exercise of that jurisdiction in light of our unique American system of dual sovereignty." In fact, the federal courts could not dispose with the exhaustion requirement, as they do when the state courts have had an opportunity to address the merits but fail to do so, if exhaustion were jurisdictional, Francisco v. Gathright, 419 U.S. 59, 63 (1974) (per curiam); McGee v. Estelle, 722 F.2d 1206, 1210 (5th Cir. 1984).

C. THE STATE'S ATTORNEY GENERAL IS EMPOWERED TO WAIVE EXHAUSTION

Nowhere in Rose is there the suggestion that the Attorney General of a state cannot act for the state and waive the right to have the question first presented in state court. As the Fifth Circuit noted in McGee:

> As the chief legal officer of the state, the attorney general is the appropriate person to assert, or to waive, the state's right first to determine a claim that the state is holding a person in custody in violation of his federal constitutional rights or statutory rights, at 722 F.2d 1212.

The Illinois Attorney General is a constitutional officer, Constitution of Illinois 1970, Article V, §15. He is given plenary authority by the Illinois General Assembly to represent the state and its officers, Chapter 14, Illinois Revised Statutes, Paragraph 4. If the citizens of Illinois are not satisfied with the manner in which the Attorney General is fulfilling his duties, they can remove him or not re-elect him. He has the power and authority to determine whether it is in Illinois' interests to have claims made initially in state or federal court. Nothing in Rose suggests that federal courts are to second guess representation provided by the attorney general and compel the enforcement of a non-jurisdictional rule of comity.

D. COMITY, FEDERAL LAW AND PUBLIC POLICY SUPPORT WAIVER

State waiver of the exhaustion requirement may be explicit or implicit, McGee v. Estelle, 722 F.2d 1206, 1213 (5th Cir. 1984). Jenkins v. Fitzberger, 440 F.2d 1188 (4th Cir. 1971), is an example of the former. In Jenkins, the state attorney general sought to waive the issue of exhaustion and have the case decided on its merits. Notwithstanding the state's waiver, the district court dismissed the petition for failure to exhaust all available state court remedies. The United States Court of Appeals for the Fourth Circuit reversed. The court reasoned that because the exhaustion requirement is a matter of comity, the federal courts may defer to the state's wishes and accept the waiver, Jenkins v. Fitzberger, 440 F.2d 1188, 1189 (4th Cir. 1971). In Thompson v. Wainwright, 714 F.2d 1495, 1504 (11th Cir. 1983), the Eleventh Circuit concluded:

> The nature of comity between national and state sovereignties in our federal system, as applied to the exhaustion doctrine in two-tier collateral review, necessarily implies power of the state to waive its right of initial review. Federal support of initial review in the state courts is not primarily to vindicate federal interests but in large measure arises out of deference to state interests. It is designed to protect the state courts' rule in the enforcement of federal law and prevent the disrupting of state judicial proceedings. Exhaustion is intended to give the state the opportunity for initial review. In particular cases, the state may decide that its role is better performed, and its judicial proceedings disrupted less, by foregoing the opportunity of initial review. (Citations omitted, original emphasis).

Closely related to the express waiver is the implied waiver, Rubin, Toward a General Theory of Waiver, 28 U.C.L.A. Law Rev. 478, 514-15 (1981) ("The principle of stage preclusion," a component of waiver, "demands that a right be asserted during the stage to which it is most relevant.") The state's failure to raise the issue of exhaustion in a timely fashion constitutes a waiver, McGee v. Estelle, 722 F.2d 1206, 1213 (5th Cir. 1984), Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983), Shaw v. Boney, 695 F.2d 528, 529 n.1 (11th Cir. 1983), Wesselt v. State of Alabama, 595 F.2d 247, 250-51 (5th Cir. 1979) (failure to raise the issues of non-exhaustion in the district court constitutes a waiver.)

Rose v. Lundy only requires that the state shall have the opportunity to initially review the alleged violation of constitutional and statutory rights. In the instant case, the State waived its opportunity by failing to assert non-exhaustion in its answer to the habeas corpus petition. Indeed, federal law compels such a conclusion. As stated by Judge Meritt, dissenting in Bowen v. Tennessee, 698 F.2d 241, 245 (6th Cir.) (en banc):

> Rule 5 of the rules governing habeas corpus cases in the District Court adopted by the Supreme Court on April 26, 1976, 28 U.S.C. Sec. 2254, requires the defendant to set out in its answer, its position respecting exhaustion of state remedies. Rule 11 of those rules makes the Federal Rules of Civil Procedure applicable. Rule 12(h), Federal Rules of Civil Procedure, provides that the failure to raise a defense other than subject matter jurisdiction shall constitute a waiver of the defense. The defendant by failing to raise the point below has

> waived its claim that a mixed petition should be dismissed.

The writ of habeas corpus is commonly known as the "great writ of liberty", Black's Law Dictionary 363 (5th ed. 1983); Bowen v. Johnston, 306 U.S. 19, 26 (1939) (Hughes, C.J.) (habeas corpus is a "precious safeguard of personal liberty"). Because of the prominent role that this writ plays in liberating unlawfully imprisoned persons, habeas corpus petitioners are entitled to the swift adjudication of their rights. The Respondent in this case has delayed the adjudication of the merits of this petition by more than thirty months by not raising an exhaustion question until the case had reached the appellate court. The Respondent's approach requires additional litigation in the state and federal courts. Such an approach entails the expenditure of additional time and money on the part of the state and Petitioner, the inefficient use of judicial resources, and delay before the merits of Petitioner's claim are addressed once again.

Furthermore, cases decided by the Court which are analogues to habeas exhaustion support waiver by the attorney general. For example, in Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981), this Court refused to consider the issue of procedural default in state court as enunciated in Wainwright v. Sykes, 433 U.S. 72 (1977), because the state failed to raise it, see also, Comment, State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions, 50 U. Chic. L. Rev. 354, 370-376 (1983).

Petitioner respectfully submits that this Court should grant the instant writ and establish a uniform rule that by failing to assert the issue of exhaustion in the district court, the state therefore waives it.

III

IN ANY EVENT, PETITIONER EXHAUSTED HIS STATE COURT REMEDIES AND FURTHER RECOURSE TO THE COURTS OF ILLINOIS WOULD BE FUTILE

A. PETITIONER HAS EXHAUSTED HIS STATE COURT REMEDIES

Petitioner asserts that he has exhausted his state court remedies by presenting the identical issues raised in this federal habeas petition to the Illinois Supreme Court by way of petition for writ of mandamus. Under Illinois law, mandamus is the proper remedy to raise the issue, People ex rel. Abner v. Kinney, 30 Ill.2d 201, 195 N.E.2d 651 (1964). Petitioner has fairly presented his claim to the state courts and that is all this Court requires, Picard v. Conner, 404 U.S. 270, 275 (1971).

Although the Illinois Supreme Court denied the petition without prejudice to the Petitioner proceeding in the state trial courts, there is no requirement that the state court address the merits of the claim, Smith v. Digman, 434 U.S. 332, 333 (1978). Moreover, there is no suggestion that the Illinois Supreme Court denied the Petition for some procedural reason or denied the Petition other than on the merits.

In the instant case it was perfectly reasonable for the Petitioner to advance his claim directly to the Illinois Supreme Court, in view of the direct precedent against him in the Appellate Court having jurisdiction over the case, Harris v. Irving, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980). The Illinois Supreme Court might have remanded the case to a lower court for consideration, but it did not. It denied the Petition outright. The Petitioner has fairly presented his claim to the State's highest court, and it was rejected. That is all that is required.

B. FURTHER RECOURSE TO THE ILLINOIS COURTS WOULD BE FUTILE AND ANOMALOUS

Petitioner submits that exhaustion should not be required in the case because further recourse to the state courts of

Illinois would be futile. The Illinois Appellate Court having jurisdiction over Petitioner has directly ruled against him on the precise issue of whether the application of the new Illinois parole criteria acts as an ex post facto law as to offenses occurring while earlier criteria were being utilized, Harris v. Irving, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980), appeal denied, 82 Ill.2d 584 (1980). It would not only be a grossly inefficient use of judicial resources, but also futile to require this Petitioner to file a petition in the Circuit Court of Johnson County, Illinois (where he is confined), have that Court affirm on the basis of Harris, require Petitioner to appeal to the same Court which decided Harris, and finally require him to file a petition for leave to appeal to the Illinois Supreme Court.

Such a requirement would be manifestly inappropriate in this case because the law on the merits of Petitioner's claim has not come from the state courts, but from the United States Court of Appeal for the Seventh Circuit. Even if an Illinois Court were inclined to reconsider the holding in Harris, it would be faced with the direct, contrary, and recent authority of the Seventh Circuit in Heirens v. Mizell, 729 F.2d 449 (7th Cir.1984) cert. denied, 105 S.Ct. 147 (1984).*

Thus, whatever the merits of the question of waiver in this case, recourse to state court would be futile and should not be required.

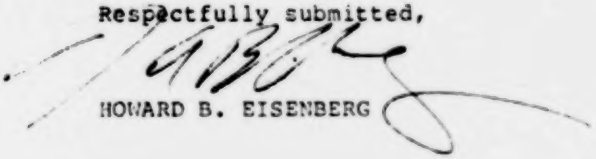
---

* On the merits, Petitioner vehemently asserts that the Court of Appeals incorrectly decided Heirens, and that the earlier decision of the Court in Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982) correctly resolved the question. Petitioner concedes that the merits of the question are not presently before this Court.

CONCLUSION

This case presents this Court with an excellent vehicle to establish a uniform rule that the state, through its chief legal officer, waives the issue of exhaustion if it is not asserted in the district court. For the reasons specified herein, Petitioner respectfully prays that a writ of certiorari to the United States Court of Appeal for the Seventh Circuit issue, that this Court give full consideration to the issues raised herein, and that the Court rule that the State has waived the exhaustion issue so that the Seventh Circuit may address the merits of Petitioner's claim.

Respectfully submitted,



HOWARD B. EISENBERG

DAVID ELLINGTON
Senior Law Student

LEGAL CLINIC
Southern Illinois University
School of Law
104 Lesar Law Building
Carbondale, IL 62901
(618) 536-4423

Attorney for Petitioner

No. 85-6790

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

-vs-

JIM GREER, Warden,

Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROMA J. STEWART
Solicitor General
State of Illinois

MARK L. ROTERT

TERENCE M. MADSEN
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

*COUNSEL OF RECORD

QUESTIONS PRESENTED

1. Whether this Court should expend its valuable time and resources to resolve a procedural question which is consistent with the rule of the majority of the circuits and this Court's opinion in Rose v. Lundy, when petitioner cannot prevail on the merits as a result of a decision by the United States Court of Appeals for the Seventh Circuit which overruled the authority relied on in the petition as the basis for the claim for relief?

2. Whether petitioner has exhausted his available state court remedies?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 85-6790

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

-vs-

JIM GREER, Warden,

Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced as petitioner's Appendix A.

JURISDICTION

Petitioner properly invokes this Court's jurisdiction pursuant to 18 U.S.C. §1254. However, as treated more fully below, respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

STATEMENT OF FACTS

The opinion of the Court of Appeals adequately sets forth the facts necessary for the resolution of this opinion.

REASONS FOR DENYING THE WRIT

I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS CONSISTENT WITH THE RULE IN THE MAJORITY OF CIRCUITS AND WITH THIS COURT'S OPINION IN ROSE V. LUNDY.

Pursuant to 28 U.S.C. §2254(b), a state prisoner must exhaust available state court remedies before seeking habeas corpus relief in federal court.

In Mattes v. Gagnon, 700 F.2d 1096, 1098 n. 1 (7th Cir. 1983), the court explained the impact of §2254(b) in combination with this Court's instruction on exhaustion:

> Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), holds "that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." Id. at 515, 102 S.Ct. at 1206. Thus, at the outset, the court must consider whether the petitioner succeeded in exhausting his state remedies as required by 28 U.S.C. §2254(b) (1976), although the parties do not raise the question.

This position formed the basis for the opinion below and is consistent with a majority of the circuits. See Needel v. Scafati, 412 F.2d 761 (1st Cir.) cert. denied, 396 U.S. 861 (1969); United States ex rel. Trantino v. Hatrick, 563 F.2d 86 (3rd Cir. 1977), cert. denied, 435 U.S. 928 (1978); Bowen v. Tennessee, 698 F.2d 241 (6th Cir) (en banc), cert. denied, 463 U.S. 1212 (1983); Mattes, supra; 3atchelor v. Cupp, 693 F.2d 859 (9th Cir. 1982); Naranjo v. Ricketts, 696 F.2d 83 (10th Cir. 1982). Cf. Silverstein v. Henderson, 706 F.2d 361, 365 n.9 (2nd Cir.), cert. denied 464 U.S. 864 (1983) (court places "no weight" on State's failure to assert exhaustion defense because "the state executive branch may not ordinarily have the power to waive the deference due state courts") But see Jenkins v. Fitzberger, 440 F.2d 1188 (4th Cir. 1971) (state may explicitly waive exnaustion); McGee v. Estelle, 722 F.2d 1206 (5th Cir. 1984); Purnell v. Missouri Department of Corrections, 753 F.2d 703 (8th Cir. 1985); Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983) (holding that the state may waive non-exhaustion.).

The majority position is clearly correct. As the court explained in Trantino, supra, well before this Court's decision in Rose;

> The basis for rejection of the concept of waiver in this case * * * is found in the policy underlying the exhaustion requirement. Exhaustion is a rule of comity. "Comity," in this context, is that measure of deference and consideration that the federal judiciary must afford to the coequal judicial systems of the various states. Exhaustion, then, serves an interest not of state prosecutors but of state courts. It follows, therefore, that the state court interest which underlies the exhaustion requirement of §2254(b) cannot be conceded or waived by state prosecutors - for the state court interest in having "an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" is simply not an interest that state prosecutors have been empowered to yield. "Waiver," like "concession," is not a talisman, the incantation of which will cause the exhaustion requirement to disappear. That requirement remains.

Trantino, 563 F.2d at 96.

Petitioner's assertion that the Attorney General is the chief legal officer of the state and, therefore, empowered to represent the interests of the judiciary does not detract from this principle. In a Section 2254 proceeding, brought by an inmate in custody, the Attorney General represents a specific custodian whose authority to detain the inmate has been challenged. Advancing or protecting the interests of that "client" does not convey authority to waive interests of other officers or agencies the Attorney General may also be empowered to represent, without more.

Clearly, the requirement of sua sponte consideration of exhaustion is consistent with this Court's teaching in Rose. Moreover, this requirement does not technically equate the exhaustion rule to a rule of subject matter jurisdiction but, following Rose, the rules do carry similar effects:

> Exhaustion is not purely jurisdictional because federal courts are granted subject matter jurisdiction to hear habeas corpus claims from state prisoners by 28 U.S.C. §2241(c)(3) (1976). 28 U.S.C. §§2254(b) and (c) (1976), however, limit the relief a district court may grant to those

> "applications" that present only exhausted claims. See supra text at 1533. Sections 2254(b) and (c) also narrowly define which claims may be deemed exhausted. The Supreme Court has given this statute a literal interpretation, to give full effect to the policies Congress sought to enforce. Because no two litigants may stipulate to a district court's entertaining a habeas petition when the petition does not satisfy section 2254 and Rose, the exhaustion doctrine must be viewed as quasi-jurisdicitional.

Darden v. Wainwright, 725 F.2d 1526, 1544 (11th Cir. 1984) (Tjoflat, J., dissenting)).

The panel in this case has correctly determined the exhaustion issue and their decision should not be disturbed.

II.

EVEN IF PETITIONER PREVAILS ON THE PROCEDURAL ISSUE IN THIS COURT HE CANNOT PREVAIL ON THE MERITS.

Petitioner brought this action in the United States District Court for the Southern District of Illinois in 1983. (The Magistrate's Report is Appended to the petition.) The magistrate interpreted the petition as raising one claim:

> [t]he Board retroactively applied the general deterrence paroling criterion to deny parole until Welsn v. Mizell when the Board began switching rationales, capriciously and arbitrarily. The last parole denial rationale was in the "best interest of society" which, in the context of prior denials, is a re-phrasing of the prohibited general deterrence parole criterion in this case.

(Pet. App. 3, at 2)

While the petition was pending, Welsh was specifically overruled in Heirens v. Mizell, 729 F.2d 449 (7th Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 147 (1984). The petition was denied on the basis of Heirens. (App. at 2) Heirens remains the controlling precedent in the Circuit.

As a result, short of convincing the Seventh Circuit that it was wrong when it decided in Heirens that it had been wrong when it decided Welsh, the petitioner has no possibility of ultimately prevailing regardless of what this Honorable Court decides with regard to the procedural issue.

III.

PETITIONER HAS NOT EXHAUSTED HIS AVAILABLE STATE COURT REMEDIES.

In United States ex rel. Johnson v. McGinnis, 734 F.2d 1198 (7th Cir. 1984) the court required Illinois petitioners to return to state court to challenge the sufficiency of parole denial rationales in a proceeding for a writ of mandamus. One of the claims raised by petitioner's appointed counsel on appeal in this case is identical to the claim of Johnson.

The only difference between the petitioner in Johnson and the petitioner here is that petitioner in this case did seek a writ of mandamus in the Illinois Supreme Court. In a recent similar case Chief Judge McGarr of the Northern District of Illinois discussed satisfaction of the exhaustion requirement with a view toward the nature of Illinois' remedies:

> To exhaust state remedies under 28 U.S.C. §2254(b), a state prisoner must give the state courts a fair opportunity to address the claimed violations of his federal constitutional rights. Toney v. Franzen, 687 F.2d 1016, 1021 (7th Cir. 1982). Generally, the prisoner must follow the normal appellate or post-conviction procedural routes for pursuing her claim through the state courts. Carter v. Estelle, 677 F.2d 427, 443 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983). Thus, a state supreme court's denial of a petition for an extraordinary writ does not satisfy the exhaustion requirement where denial did not constitute an adjudication on the merits of the issues presented, and where other more appropriate state remedies are available. Pitchess v. Davis, 421 U.S. 482, 488 (1975); Granberry ...

United States ex rel. Rabb Ra Chaka v. Lane, 86 C 57 (N.D. Ill. 1/27/86 (appended hereto)) (Slip Op. at 3).

The importance of procedural integrity in efforts to satisfy the exhaustion requirement is exemplified by the nature of the writ of mandamus in the Illinois Supreme Court:

> The superior Court of Cook County and this court do not exercise concurrent jurisdiction in mandamus. The superior court exercises such jurisdiction generally, but the exercise of the jurisdiction by this court is discretionary, and the court will assume jurisdiction in cases only where there is a special reason and the remedy in the trial court is ineffective...

People v. Lueders, 287 Ill. 107, 112, 122 N.E. 374 (1919).

The denial of leave to file a petition for writ of mandamus in the Illinois Supreme Court is not an adjudication on the merits and it is not a refusal by the state judiciary to consider a claim.

In Illinois, a "fair opportunity" to review the issues is not satisfied by seeking a discretionary extraordinary writ in the Supreme Court. This Court should not allow inmates to circumvent the requirement that state courts have the first opportunity to consider their claims by accepting as "exhaustion" the presentation of a petition for leave to file which will not be granted but which is likely to be denied in much less time than a circuit court could meaningfully address the merits of his claim. He should be required to follow the usual procedures by seeking his relief in a court of general jurisdiction.1/

Finally, petitioner's argument that Harris v. Irving, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980), renders futile exhaustion of his ex post facto claim is of no impact, whatsoever, on the question of exhaustion of his arbitrariness claim in this mixed petition.

This Court should reject petitioner's invitation to review this case which will not ultimately benefit petitioner and which comes to this Court burdened with the load of collateral issues involving the nature of Illinois remedies and possible mootness.

1/ Respondent notes that if petitioner has continued to receive annual hearings the challenge to the specific 1983 rationale may now be moot as the result of subsequent rationales.

C O N C L U S I O N

For all of the foregoing reasons, respondent asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROMA J. STEWART
Solicitor General
State of Illinois

MARK L. ROTERT

TERENCE M. MADSEN
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

*COUNSEL OF RECORD

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. RABB RA CHAKA, Petitioner, v. MICHAEL P. LANE, et al., Defendants.	)	No. 86 C 57

MEMORANDUM OPINION AND ORDER

Finding petitioner indigent, the Court grants his motion for leave to file in forma pauperis. The petition for a writ of habeas corpus thus comes before the Court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner asserts that enactment and interpretation of three statutes governing good conduct credits and parole procedures, as applied to him, violate the Ex Post Facto Clause. According to the petition, petitioner raised these grounds before the Illinois Supreme Court in an original jurisdiction habeas corpus petition. The Illinois Supreme Court denied petitione leave to file his petition in an order dated November 27, 1985. The question is whether petitioner's attempt to present his claims in a habeas corpus petition before the Illinois Supreme Court is sufficient to meet the exhaustion requirement imposed under 28 U.S.C. §§2254(b) and (c). We find that it does not.

To exhaust state remedies within the meaning of 28 U.S.C. §2254(b), a prisoner must give the state courts a fair opportunity to address the alleged violation of his constitutional rights. Toney v. Franzen, 687 F.2d 1016, 1021 (7th Cir. 1982). As a general rule, the "fair opportunity" docrine requires the prisoner to follow the normal appellate or postconviction procedural routes for pursuing his claim through the state courts. Carter v. Estelle, 677 F.2d 427, 443 (5th Cir. 1982). Thus, a state supreme court's denial of an application for an extraordinary writ does not satisfy the exhaustion requirement where the denial did not constitute an adjudication of the merits of the claim presented, and where more appropriate state remedies exist. Pitchess v. Davis, 421 U.S. 482, 488 (1975); Granberry v. Mizell, No. 84-1956, slip op. at 4 (7th Cir. Dec. 26, 1985).

The Illinois Supreme Court denied petitioner leave to file his habeas corpus petition. It did not deny the habeas petition itself. Although unclear, it would appear that the mere denial of the right to file an original jurisdiction habeas corpus petition before the Illinois Supreme Court does not constitute an adjudication on the merits. Most likely it reflects the court's preference that petitioner first pursue his habeas claims before the appropriate state circuit court. Although Ill.Rev.Stat. 1983, ch. 110, §10-103

delegates concurrent jurisdiction over habeas corpus petitions to both the Illinois Supreme Court and the state circuit courts, higher courts generally prefer that writs for extraordinary relief be first sought in the trial court. See Granberry, supra.

We need not in this case, however, attempt to devine the meaning of the order entered by the Illinois Supreme Court. Under the facts alleged, petitioner did not present a claim for state habeas corpus relief. The grounds for habeas corpus in Illinois are strictly limited by statute. Ill.Rev.Stat. 1983, ch. 110, §10-124. Not all claims of constitutional violations are cognizable under the Illinois habeas corpus statute. Hughes v. Kiley, 67 Ill. 2d 261, 266, 367 N.E.2d 700, 702 (1977). Because petitioner does not allege entitlement to complete discharge for his sentence, his challenge to the constitutionality of parole procedures and the method by which prison officials are calculating his good conduct credits does not come within one of the enumerated grounds for habeas corpus relief in Illinois courts. Therefore, his claims must be pursued by way of mandamus before the appropriate state circuit court. See Granberry; United States ex rel. Isaac v. Franzen, 531 F. Supp. 1086, 1090-91 (N.D. Ill. 1982).

Accordingly, finding that petitioner has not given the state a fair opportunity to consider his claims for federal habeas corpus relief, the Court summarily

dismisses the habeas corpus petition for lack of exhaustion.

ENTER:

Frank J. McGarr
UNITED STATES DISTRICT JUDGE

DATED: January 27, 1985

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S.A. ex rel. Rabb Ra Chaka

V.

Michael P. Lane, etc., et al.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 86 C 0057

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED on its own motion the court dismisses the petitio for writ of habeas corpus for lack of exhaustion.

January 27, 1986
Date

H. Stuart Cunningham
Clerk

Pauline Rolbo

No. 85-6790

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

-vs-

JIM GREER, Warden,

Respondent.

CERTIFICATE OF SERVICE AND
STATEMENT OF TIMELY FILING

I, Mark L. Rotert, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 100 West Randolph Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Joseph Spaniol, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served, to wit:

Howard B. Eisenberg
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901

I further state that this mailing took place on June 18, 1986, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: Mark L. Rotert
MARK L. ROTERT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

SUBSCRIBED and SWORN to
before me this 18th day of
June, 1986.

NOTARY PUBLIC

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

Case Number: 85-6790

RECEIVED
APR 25 1986
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WALDO GRANBERRY,

Petitioner,

vs.

LARRY MIZELL,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner, Waldo Granberry, by his attorney, Howard B. Eisenberg, respectfully moves this Court for leave to file the Attached Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit without payment of docket or other fees, in accordance with Rule 46 of this Court. In support of this Motion, Petitioner states:

1. He is presently confined at the Vienna Correctional Institution in Vienna, Illinois;

2. The undersigned attorney was appointed by the United States Court of Appeals for the Seventh Circuit to represent Petitioner in this case under the provisions of the Criminal Justice Act of 1964; and

3. The undersigned has no reason to believe that Petitioner's financial condition has changed since he was appointed to represent Petitioner.

Dated this 22nd day of April, 1986.

Respectfully submitted,

HOWARD B. EISENBERG

104 Lesar Law Building
Southern Illinois University
School of Law
Carbondale, Illinois 62901

ATTORNEY FOR PETITIONER.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-6790

WALDO G'ANBERRY,

Petitioner,

vs.

LARRY MIZELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

HOWARD B. EISENBERG

Legal Clinic
Southern Illinois University
School of Law
104 Lesar Law Building
Carbondale, IL 62901

(618) 536-4423

ATTORNEY FOR PETITIONER

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-6790

WALDO GRANBERRY,

Petitioner,

vs.

LARRY MIZELL,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

The Petitioner, Waldo Granberry, respectfully submits this Supplemental Brief in compliance with Supreme Court Rule 22.6 to call to this Court's attention the recent decision of the United States Court of Appeals for the Seventh Circuit in Mosley v. Moran, Case No. 85-1757, decided August 4, 1986, a copy of which is attached to this Brief.

In the case at bar the Seventh Circuit held that a federal court must consider the exhaustion question, whether or not it was raised by the parties. In Mosley, on the other hand, a different panel of the same Court held (slip opinion, pp. 3-5) that is was not obligated to consider the exhaustion question when waived by the State.

These two decisions emphasize the great confusion on this issue, even within the same circuit*. In the instant case the State failed to raise the exhaustion question in the District Court, and raised it only in passing in the Court of Appeals. In Mosley, on the other hand, the State had raised an exhaustion question in the District Court, but had not pursued

---

* A Petition for Rehearing in Banc was denied in the instant case. The State sought no rehearing in Mosley.

the claim on appeal. The Mosley decision provides additional basis for this Court granting the instant writ to resolve this question†.

CONCLUSION

The confusion and disagreement on the question of waiver of exhaustion in a habeas corpus petition brought pursuant to 28 U.S.C. §2254 is the type of issue which warrants definitive treatment by this Court. Petitioner urges this Court to grant the instant writ.

Respectfully submitted,

HOWARD B. EISENBERG
104 Lesar Law Building
Southern Illinois University
School of Law
Carbondale, Illinois 62901

(618) 536-4423

ATTORNEY FOR PETITIONER.

---

† Contrary to the suggestion of Respondent (Respondent's Brief, p. 4), the merits of the habeas corpus petition--which were not reached by the Court of Appeals--are not raised in this Court by Petitioner.

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1757

RONALD MOSLEY,

Plaintiff-Appellant,

v.

CAPTAIN MORAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 4423—**Frank J. McGarr**, *Judge.*

ARGUED JUNE 17, 1986—DECIDED AUGUST 4, 1986

Before WOOD, JR., POSNER, and FLAUM, *Circuit Judges.*

I.

PER CURIAM. Plaintiff, Ronald Mosley, is incarcerated at the Stateville Correctional Center in Illinois. Although his complaint contained a variety of claims, the only claim before us on appeal is Mosley's habeas corpus claim challenging the methods employed in determining his release date. The district court determined that Mosley could have pursued a mandamus action in state court, but that he was not required to exhaust his state court remedies because he was entitled to immediate release if he prevailed on his federal habeas claim. The state does not

raise the exhaustion issue on appeal. Initially the district court granted relief on the habeas claim, but, after being provided with more facts, it reconsidered its decision and denied relief. Mosley appealed. While the appeal was pending, the district court granted a certificate of probable cause. We have jurisdiction over the appeal. *See* 28 U.S.C. §§ 1291, 2253.

Mosley began serving his sentence in February 1975. Under the system then in force, Mosley was given a minimum and maximum sentence. The minimum sentence governed his eligibility for parole and his maximum sentence governed his release from incarceration or parole. While incarcerated he could earn "statutory good time credit" for time served with good behavior and "compensatory good time credit" based on tasks he performed. These credits reduced both his minimum sentence and maximum sentence. *See* Ill. Rev. Stat. ch. 38, §§ 1003-3-3, 1003-6-3, 1003-12-5, 1005-8-1 (1977); *Johnson v. Franzen*, 77 Ill. 2d 513, 397 N.E.2d 825, 826 (1979). On February 1, 1978, statutes went into effect which provided for a new system of determinate sentences under which "good conduct credit" was computed solely on the basis of time served with good behavior. Credits move up the prisoner's release date with no separate computation for parole. *See* Ill. Rev. Stat. ch. 38, §§ 1003-3-3, 1003-6-3(a), 1005-8-1 (1978); *Johnson*, 397 N.E.2d at 826-27. The new statute also provided for review by the Prisoner Review Board of revocations of more than thirty days' good conduct credit during any twelve-month period. Ill. Rev. Stat. ch. 38, §§ 1003-3-2(a)(4), 1003-6-3(c) (1978). Following their first parole hearing after February 1, 1978, prisoners incarcerated under the old system were given notice and the opportunity to choose between the new and old system. *See id.* § 1003-3-2.1.

In September 1978, Mosley was notified that he had sixty days in which he could choose to either remain on the old parole system or accept the new release date system. He timely sought reconsideration of the proposed release date. The reconsideration was denied and in Feb-

ruary 1979 he was again given sixty days to select one of the options. Mosley never responded so by default he continued under the old system. In July 1979, Mosley was involved in an altercation with two guards. The guards allegedly falsified reports and Mosley subsequently lost one years' good time credit. Mosley also alleges that he improperly lost a total of six years and four months of good time credit during 1979. In March 1980, presumably because of a decision of the Illinois Supreme Court, *see Johnson v. Franzen*, 77 Ill. 2d 513, 397 N.E.2d 825 (1979), Mosley was given another opportunity to choose between the two systems. He again failed to respond within the allotted sixty days. In his federal habeas petition, Mosley complains that his good time credits should not have been revoked without the revocation being reviewed by the Prisoner Review Board.

II.

The question of whether Mosley exhausted his state court remedies (a nonjurisdictional prerequisite for federal habeas relief, *see* 28 U.S.C. § 2254(b)) was raised and argued in the district court, but has not been raised on appeal. At oral argument, appellant admitted that he has not exhausted his state court remedies,[1] but argued that it is not mandatory that we reach that issue if not raised by the state on appeal. At oral argument, the state expressly waived raising the exhaustion issue. Counsel pointed out that she had consciously decided not to raise

[1] The district court, following *Lepore v. Anderson*, 448 F. Supp. 716, 717 (M.D. Pa. 1978), found that Mosley would be entitled to immediate release if successful on his habeas claim and therefore exhaustion was not required. As discussed below we find it unnecessary to reach the exhaustion issue, but do note that had we been required to reach that issue we strongly doubt that we would have followed *Lepore*. A large number of, if not most, habeas petitions seek immediate release. If a request for such relief was a sufficient ground to ignore the exhaustion requirement, the exhaustion requirement would be largely obliterated.

the issue on appeal because this case had already been proceeding for over six years and she believed it would be inappropriate to deny relief on exhaustion grounds after such a length of time. *Cf. Farley v. Nelson*, 469 F. Supp. 796, 801 (D. Conn.), *aff'd without opinion*, 607 F.2d 995 (2d Cir. 1979).

It is clear that we *may* reach the exhaustion issue *sua sponte* where the state failed to raise the issue below, but raises it for the first time on appeal. *See Granberry v. Mizell*, 780 F.2d 14, 15-16 (7th Cir. 1985). There is also precedent in this circuit indicating that we *must* always consider exhaustion. *See Mattes v. Gagnon*, 700 F.2d 1096, 1098 n.1 (7th Cir. 1983). Additionally, there are cases questioning whether the exhaustion requirement may be expressly waived by state executive officials. *See Walberg v. Israel*, 766 F.2d 1071, 1072 (7th Cir. 1985); *Granberry*, 780 F.2d at 15-16. However, there is also a recent case where the parties did not raise the exhaustion issue on appeal and we therefore found it unnecessary to reach the issue. *See United States ex rel. Russo v. Attorney General of Illinois*, 780 F.2d 712, 714 n.1 (7th Cir. 1986) (per curiam), *cert. denied*, 106 S. Ct. 2922 (1986). None of the cases cited required that we decide if the state can expressly waive the exhaustion requirement and we have yet to resolve that question. The present case also does not require the resolution of that question which we leave for another day. We believe that the precedents permit us to not reach the exhaustion issue when "special circumstances" are present, *see Frisbie v. Collins*, 342 U.S. 519, 520-22 (1952), but we emphasize that a federal court should reach nonexhausted habeas claims only "in those rare instances where justice so requires." *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86, 95 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978), quoting *United States ex rel. Graham v. Marcusi*, 457 F.2d 463, 468 (2d Cir. 1972). In light of the facts that Mosley has been pursuing the present litigation in federal court for almost seven years; the exhaustion issue was not raised in the briefs;

and counsel for the state has expressly stated that she does not wish to raise the exhaustion issue, we find this to be a case in which we need not reach the exhaustion issue *sua sponte*.

III.

In *Johnson v. Franzen*, the Illinois Supreme Court determined that the 1978 statutory amendments provided that beginning February 1, 1978, good conduct credits would be earned by all prisoners. This includes those incarcerated prior to that date who chose to continue on the old parole system. 397 N.E.2d at 827-29. The Department of Corrections, however, continues to compute credits based on the good time system if that system is more beneficial; that procedure has been approved by the courts. *See Williams v. Irving*, 98 Ill. App. 3d 323, 424 N.E.2d 381, 384 (1981); *Barksdale v. Franzen*, 700 F.2d 1138, 1142 (7th Cir. 1983). The prohibition on *ex post facto* laws presumably requires the continuation of the good time system for those previously incarcerated prisoners for whom it is beneficial. *See id.* at 1140 n.2.

The Prisoner Review Board reviews revocations of more than thirty days of good conduct credits. Ill. Rev. Stat. ch. 38, §§ 1003-3-2(a)(4), 1003-6-3(c) (1978); *Taylor v. Franzen*, 93 Ill. App. 3d 1152, 420 N.E.2d 1203, 1204 (1981). The plain language of the statute is ambiguous regarding whether the Board also reviews revocations of good time credits. Under the former system, the Director of the Department of Corrections determined whether good time credits should be revoked. The statute defining the Board refers to the review of "good time" credits. *See* Ill. Rev. Stat. ch. 38, § 1003-1-2(l) (1978). However, the statutes delineating the Board's review power refer only to the review of revocations of "good conduct" credits. *See id.* §§ 1003-3-1, 1003-3-2, 1003-6-3. The Department of Corrections has decided that under the current statute the Board is not empowered to review revocations of good

time credits. One Illinois case speaks of good conduct and good time credits interchangeably and can be read as implicitly holding that the Board reviews revocations of good time credits, *see generally Taylor v. Franzen*, 93 Ill. App. 3d 758, 417 N.E.2d 242, *supplemental opinion on rehearing*, 93 Ill. App. 3d 1152, 420 N.E.2d 1203 (1981), but such a reading is far from clear.[2] Mosley did not cite *Taylor* nor does either party refer us to any Illinois case construing the statute as regards the issue pertinent to this appeal and we have not found any. We are therefore faced with a question of first impression regarding the construction of a state statute.

Illinois prisoners have a constitutionally protected interest in the good time credits they have accumulated. *Williams v. Irving*, 424 N.E.2d at 386; *People ex rel. Yoder v. Hardy*, 116 Ill. App. 3d 489, 451 N.E.2d 965, 967 (1983); *Jackson v. Lane*, 611 F. Supp. 933, 935 (N.D. Ill. 1985). Mosley does not contend that the hearing provided to him by the Director did not comply with the minimum requirements of due process mandated by the Constitution. He argues only that the statutorily mandated review by the Board was denied and that violation of the state statute violates constitutional due process. We note though that only violations of federal statutory or constitutional law can be the basis for granting federal habeas relief, *United States ex rel. Hoover v. Franzen*, 669 F.2d 433, 436-37 (7th Cir. 1982), and state law claims ordinarily cannot be pendent to federal habeas claims, *see id.* at 445. Even assuming that the state statute mandates

[2] *Taylor* involves the revocation of one year of credit on February 8, 1979 for an offense committed in January 1979. As of February 1, 1979 Taylor could have accumulated one year of good conduct credit, but throughout the original opinion the court usually refers to the revocation of his "good time" credits. In the supplemental opinion the court explicitly held that the Prisoner Review Board is the proper body to review the revocation of "good conduct" credits.

review by the Prisoner Review Board, we doubt that failure to follow the statute would be a violation of constitutional due process. *See Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Shango v. Jurich*, 681 F.2d 1091, 1101 (7th Cir. 1982); *Harris v. McDonald*, 737 F.2d 662, 665 (7th Cir. 1984) (per curiam); *Muckway v. Craft*, 789 F.2d 517, 521-22 (7th Cir. 1986), quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944); *Hoover v. Franzen*, 669 F.2d at 445 n.28; *Hall v. Wainwright*, 733 F.2d 766, 782 (11th Cir. 1984) (Hill, J., specially concurring), *cert. denied*, 105 S. Ct. 2344 (1985). However, the state does not make this argument so we decline to reach it. In any event, habeas relief is being denied for other reasons so it is not necessary to reach the issue.

As we pointed out above, the applicable statute is ambiguous. However, only the section generally defining the Prisoner Review Board refers to the review of the revocation of good time credits.[3] The sections more specifically delineating the Board's powers and duties refer only to the review of good conduct credits.[4] It is a principle of

[3] "Prisoner Review Board" means the Board established in Section 3-3-1(a), independent of the Department, to review rules and regulations with respect to *good time credits*, to hear charges brought by the Department against certain prisoners alleged to have violated Department rules with respect to *good time credits*, . . .

Ill. Rev. Stat. ch. 38, § 1003-2-1(i) (1978) (emphasis added).

[4] Establishment and Appointment of Prisoner Review Board. (a) There shall be a Prisoner Review Board independent of the Department of Corrections which shall be: . . .

(2) the board of review for cases involving the revocation of *good conduct credits* or a suspension or reduction in the rate of accumulating such credit; . . .

Ill. Rev. Stat. ch. 38, § 1003-3-1 (1978) (emphasis added).

Powers and Duties. (a) . . . the Prisoner Review Board shall . . .

(Footnote continued on following page)

[4] *continued*

(4) hear by at least 1 member and through a panel of at least 3 members, decide cases brought by the Department of Corrections against a prisoner in the custody of the Department for alleged violation of Department rules with respect to *good conduct credits* pursuant to Section 3-6-3 of this Code in which the Department seeks to revoke *good conduct credits*, if the amount of time at issue exceeds 30 days or when, during any 12 month period, the cumulative amount of credit revoked exceeds 30 days except where the infraction is committed or discovered within 60 days of scheduled release. In such cases, the Department of Corrections may revoke up to 30 days of *good conduct credit*. The Board may subsequently approve the revocation of additional *good conduct credit*, if the Department seeks to revoke *good conduct credit* in excess of thirty days. However, the Board shall not be empowered to review the Department's decision with respect to the loss of 30 days of *good conduct credit* for any prisoner or to increase any penalty beyond the length requested by the Department; . . .

Id. § 1003-3-2 (emphasis added).

Rules and Regulations for Early Release. (a)(1) The Department of Corrections shall prescribe rules and regulations for the early release on account of *good conduct* of persons committed to the Department which shall be subject to review by the Prisoner Review Board. . . .

(c) The Department shall prescribe rules and regulations for revoking *good conduct credit*, or suspending or reducing the rate of accumulation thereof for specific rule violations, during imprisonment. Such rules and regulations shall provide that: . . .

(2) no inmate may be penalized more than one year of *good conduct credit* for any one infraction.

When the Department seeks to revoke, suspend or reduce the rate of accumulation of any *good conduct credits* for an alleged infraction of its rules, it shall bring charges therefor against the prisoner sought to be so deprived of *good conduct credits* before the Prisoner Review Board as provided in subparagraph (a)(4) of Section 3-3-2 of this Code, if the amount of credit at issue exceeds 30 days or when during any 12 month period, the cumulative amount of credit revoked exceeds 30 days except where the infraction is committed or discovered within 60 days of scheduled release. In such cases,

(Footnote continued on following page)

statutory construction "that a more specific statute will be given precedence over a more general one." *United States v. Olinger*, 759 F.2d 1293, 1299 (7th Cir.), *cert. denied*, 106 S. Ct. 120 (1985), quoting *Busic v. United States*, 446 U.S. 398, 406 (1980). Therefore, looking to the more specific sections, the statute should be read as only providing for the review of the revocation of good conduct credits. Such a reading is consistent with the fact that Illinois continues to maintain two relatively discrete systems of computing the time to be served by prisoners; it is consistent with the legislation to assume that new review procedures apply only to computations under the new system. Also, statutes that went into effect subsequent to the commission of the crime will not be applied retroactively unless there is statutory language clearly to that effect. *See People ex rel. Kerner v. McKinley*, 371 Ill. 190, 20 N.E.2d 498, 501 (1939). There is no such clear language in the new Act.[5] Additionally, in interpreting

[4] *continued*
the Department of Corrections may revoke up to 30 days of *good conduct credit*. The Board may subsequently approve the revocation of additional *good conduct credit*, if the Department seeks to revoke *good conduct credit* in excess of thirty days. However, the Board shall not be empowered to review the Department's decision with respect to the loss of 30 days of *good conduct credit* within any calendar year for any prisoner or to increase any penalty beyond the length requested by the Department.

(3) The Director of the Department of Corrections, in appropriate cases, may restore up to 30 days *good conduct credits* which have been revoked, suspended or reduced. Any restoration of *good conduct credits* in excess of 30 days shall be subject to review by the Prisoner Review Board. However the Board may not restore *good conduct credit* in excess of the amount requested by the Director. . . .

Id. § 1003-6-3 (emphasis added).

[5] Mosley argues that *Johnson v. Franzen* decides that the Illinois legislature intended for all aspects of the new legislation to apply to prisoners sentenced under the old system. *Cf. Johnson*, 397 N.E.2d at 827-28. But *Johnson* only decided that good conduct

(Footnote continued on following page)

state law, we will give substantial deference to the interpretation of the district court, *see Goldstick v. ICM Realty*, 788 F.2d 456, 466 (7th Cir. 1986), and in the present case the district court held that the statute does not provide for Board review of good time revocations. Last, we should be cautious in expanding rights under state law absent clear reasons to do so.[6] *Cf. Trembath v. St. Regis Paper Co.*, 753 F.2d 603, 605 (7th Cir. 1985). For these reasons, we read the statute as not providing for Board review of good time revocations.

Mosley also argues that there is an equal protection violation. But he alleges no invidious discrimination and it is not irrational to implement a new system and provide new procedures only to those who fall under the new system. Additionally, there is no claim that Mosley is treated differently from other prisoners who accumulated or still accumulate good time credits. *Cf. Raimondo v. Belletire*, 789 F.2d 492, 497 (7th Cir. 1986); *Inglese v. United States Parole Commission*, 768 F.2d 932, 940 (7th Cir. 1985); *Durso v. Rowe*, 579 F.2d 1365, 1372 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979).

Mosley cannot succeed on his claim that his good time credits were improperly revoked because the revocation was not reviewed by the Prisoner Review Board. Therefore, he had adequate information by which to select between the parole and release systems and he was given adequate time and opportunity to make that selection.

[5] *continued*
credits must be provided for all time served after February 1, 1978 regardless of whether the prisoner is under the parole or release date system. *Id.* at 829. The Illinois Supreme Court repeated a number of times that that conclusion was based on the express language contained in Ill. Rev. Stat. ch. 38, § 1005-8-7(b) (1978). *Johnson*, 397 N.E.2d at 827-29.

[6] The Illinois courts are of course free to construe the statute and reach a conclusion different from ours. If they do so in the future, we will, of course, be bound by their interpretation. *See Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

Also, since the Department of Corrections computes his present accumulation of credits toward parole under both the good time and good conduct systems, and applies whichever is more beneficial, *see Williams v. Irving*, 424 N.E.2d at 384; *Barksdale v. Franzen*, 700 F.2d at 1142, there can be no complaint that his present accumulation of credits is administered improperly. Mosley has no claim upon which habeas relief can be granted. It was proper to deny him an evidentiary hearing on his claims.

IV.

For the reasons given above, the judgment of the district court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 60054—Midwest Law Printing Co., Inc., Chicago—8-4-86—450

CERTIFICATE OF MAILING

I hereby certify that on August 15, 1986 I served a copy of the foregoing Supplemental Brief upon counsel for Respondent by mailing a copy thereof to:

Mark L. Rotert
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

by mailing a copy thereof with postage prepaid and properly affixed at Carbondale, Illinois.

Respectfully submitted,

HOWARD B. EISENBERG

104 Lesar Law Building
Southern Illinois University
School of Law
Carbondale, Illinois 62901

(618) 536-4423

ATTORNEY FOR PETITIONER.

No. 85-6790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALDO E. GRANBERRY,
Petitioner,

v.

JIM W. GREER, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

JOINT APPENDIX

HOWARD B. EISENBERG
(appointed by this Court)
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901
(618) 536-4423
Attorney for Petitioner

NEIL F. HARTIGAN
Attorney General
State of Illinois

MARK L. ROTERT
(Counsel of Record)

TERENCE M. MADSEN
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570
Attorneys for Respondent

PETITION FOR CERTIORARI FILED APRIL 22, 1986
CERTIORARI GRANTED OCTOBER 6, 1986

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
Aug. 10	1	PETITION for Writ of Habeas Corpus
	2	Supporting MEMORANDUM for Petition by Petitioner.
Aug. 12	3	ORDER
Aug. 31	5	MOTION to Dismiss by Respondent.
	6	BRIEF in Support of Motion to Dismiss by Respondent.
Sept. 8	8	RESPONSE to Motion to Dismiss by Petitioner
1984		
Mar. 26	9	REPORT & RECOMMENDATION
Apr. 6	10	OBJECTION to Magistrate's Report and Recommendation
Apr. 18	11	MEMORANDUM & ORDER (JLF) adopting Mag. Cohn's R & R that Respondent's Mot to Dis be granted. This action is DISMISSED.
Apr. 20		CASE CLOSED
May 17	12	NOTICE of Appeal by Petitioner.
May 31	13	ORDER that Petitioner's Mot for a Certificate of Probable Cause is Denied.
May 30	14	MOTION for a Certificate of Probable Cause
June 11		Appeal docketed in USCA and assigned No. 84-1956
1986		
Apr. 14	15	ORDER (USCA) that judgment of District Court is REMANDED in accordance with the opinion of this court. DATED: 12/26/85

DATE	NR.	PROCEEDINGS
	16	ORDER (USCA) that Petition for rehearing is DENIED. DATED: 02/28/86
Apr. 14		JS#5 reopening case X820 Index
Apr 16	17	ORDER (JLF) that Order of Crt of 5/31/84 is vacated & set aside & that the Petn filed on 08/10/83 is DISMISSED for failure to exhaust state remedies. DATED 04/16/86.
Apr 17		CASE CLOSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FORM FOR USE IN APPLICATIONS FOR
HABEAS CORPUS UNDER 28 U.S.C. § 2254

Name WALDO E. GRANBERRY

Prison Number C-6422

Place of Confinement Vienna Correctional Center,
Vienna, Illinois 62995

United States District Court
Southern District of Illinois

Case No. 83-3235

WALDO E. GRANBERRY, PETITIONER

vs.

LARRY MIZELL, Warden, RESPONDENT

and

THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
ADDITIONAL RESPONDENT

(Instructions Omitted)

PETITION

1. Name and location of court which entered judgment of conviction under attack Criminal Court of Cook County, Chicago, Illinois
2. Date of judgment of conviction June 22, 1960

3. Length of sentence concurrent 99 yrs, life, 1-life Sentencing Judge Alfred Cilella

4. Nature of offense or offenses for which you were convicted murder, rape, armed robbery

5. What was your plea? (Check one)

   (a) Not Guilty ( )
   (b) Guilty (X)
   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment and a not guilty plea to another count or indictment, give details ———————

6. Kind of Trial: (check one)

   (a) Jury ( )
   (b) Judge only (X)

7. Did you testify at trial? (Yes ( ) No (X)

8. Did you appeal from the judgment of conviction?
   Yes ( ) No (X)

9. If you did appeal, answer the following:

   (a) Name of Court
   (b) Result
   (c) Date of Result

   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: ———————

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes (X) No ( )

11. If your answer to 10 was "yes, give the following information:

    (a) (1) Name of Court Criminal Court of Cook County
    (2) Nature of Proceeding Post-Conviction
    (3) Grounds raised involuntary plea of guilty
    See: *People v. Granberry*, 45 Ill. 2d 11, 256 N.E. 2d 830 (1970)
    (4) Did you receive an evidentiary hearing on your petition, application or Motion?
    Yes ( ) No (X)
    (5) Result denied
    (6) Date of Result 3-24-70

    (b) As to any second petition, application or motion give the same information:

    (1) Name of Court Illinois Supreme Court
    (2) Nature of proceeding Mandamus petition
    (3) Grounds raised Violation of the Ex Post Facto Clause in parole denial
    Long et al (Granberry) v. Irving et al, # 7023
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes( ) No (X)
    (5) Result denied without prejudice
    (6) Date of result 10-26-81

    (c) As to any third petition, application or motion, give the same information:

    (1) Name of Court Illinois Supreme Court
    (2) Nature of proceeding Mandumus petition
    (3) Grounds raised Unlawful denial of parole for same rationale condemned in *Ware v. Kaufman*, # 80C3209 (N.D. Ill. 6-3-82) *Granberry v. Illinois Prison Review Board*, # 7145

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No (X)
(5) Result denied
(6) Date of result 4-13-83

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First Petition, etc. YES (X) NO ( )
(2) Second petition, etc. YES (X) NO ( )
(3) Third petition, etc. YES (X) NO ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: ———

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

(Instructions Omitted)

A. Ground one: Denied parole contrary to statutory directive (Due Process) and in violation of the F Post Facto Clause

Supporting FACTS (tell your story *briefly* without citing cases or law): Granberry was consistently denied parole since 1971 despite the parole board's administrative decisions that he was not a "substantial risk" and his prison behavior warranted parole. The Board retroactively applied the general deterrence paroling criterion to deny parole until *Welsh v. Mizell* when the Board began switching rationales, capriciously and arbitrarily. The last parole denial rationale was in the "best interest of society" which, in the context of prior denials, is a re-phrasing of the prohibited general deterrence parole criterion in this case.

(No additional "Grounds" Enumerated in Petition)

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: ———

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? YES ( ) NO (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attached herein:

(a) At preliminary hearing James Douherty, public defender of Cook County, Chicago, Illinois
(b) At arraignment and plea same
(c) At trial same
(d) At sentencing same
(e) On appeal
(f) In any post-conviction proceeding James Dougherty, P.D., Chicago
(g) On appeal from any adverse ruling in a post-conviction proceeding Edmund W. Kitch, appellate defender, Chicago

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
YES (X) NO ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? YES ( ) NO (X)

(a) If so, give name and location of court which imposed sentence to be served in the future:
(b) And give date and length of sentence to be served in the future:
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
YES ( ) NO ( )

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 8, 1983

/s/ Waldo E. Granberry
(Signature)

(Signature of Attorney)
if any

[SEAL]

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
Springfield
62706

April 13, 1983

JULEANN HORNYAK
CLERK

Telephone
Area Code 819
782-2039

Mr. Waldo Granberry
Reg. No. C-6422
Box 1000
Vienna, IL 62995

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 7145—People ex rel. Waldo Granberry, petitioner vs. Illinois Prison Review Board, respondent.

The portion of the motion by petitioner for leave to file a petition for writ of *mandamus* and for appointment of counsel is denied. The part of the motion for leave to sue as a poor person is allowed.

JULEANN HORNYAK
Clerk

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
Springfield
62706

October 30, 1981

Mr. Robert Long
Reg. No. C-10357
Box 100
Vienna, IL 62995

In re: People ex rel. Robert Long, et al., petitioners, vs. James Irving, Chairman, et al., respondents. No. 7023

Dear Mr. Long:

The Supreme Court on October 21, 1981, made the following announcement concerning the above entitled cause:

The motion by respondents for leave to cite supplemental authority is allowed.

The motion by petitioners for leave to file a petition for an original writ of mandamus is denied without prejudice to proceeding in any appropriate circuit court for consideration of the question presented; *Harris v. Irving* (1980) 90 Ill. App. 3d 56, Leave to appeal denied January 30, 1981, No. 54264; and *Weaver v. Graham* (February 24, 1981), 28 Crl 3077, 450 U.S. ——, 101 S. Ct. 960.

It is unnecessary to consider the motion by petitioners for appointment of counsel.

Very truly yours,

Clerk of the Supreme Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 83-3235

WALDO E. GRANBERRY, PETITIONER,

vs.

LARRY MIZELL, Warden, RESPONDENT.

ORDER

Respondent(s) shall, within twenty-three (23) days of receipt of this application for writ of habeas corpus, answer and show cause why the writ should not issue.

Service upon the Attorney General, State of Illinois, 500 S. Second Street, Springfield, Illinois 62706, shall constitute sufficient service.

ENTERED this 11th day of August, 1983.

/s/ Gerald B. Cohn
GERALD B. COHN
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

[Title Omitted in Printing]

MOTION TO DISMISS

Respondent, by his attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, moves this Court for an order dismissing the above-referenced cause because it fails to state a claim upon which relief may be granted. Rule 12(b)(6) Federal Rules of Civil Procedure.

A brief in support of this motion is attached.

WHEREFORE, for the reasons more fully explained in the brief attached hereto and incorporated herein, respondent respectfully moves that this Court dismiss the instant petition.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

By: /s/ Rober Huebner
ROGER HUEBNER
Assistant Attorney General
500 South Second Street
Springfield, IL 62706
(217) 782-1090

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

[Title Omitted in Printing]

BRIEF IN SUPPORT OF MOTION TO DISMISS

Respondent submits this brief in support of his motion.

The petitioner, Waldo Granberry, is presently incarcerated at the Vienna Correctional Center, Vienna, Illinois.

In 1960, petitioner entered guilty pleas to the following offenses and the Circuit Court of Cook County imposed the following sentences, respectively: murder, 99 years; armed robbery, 1 year to life; robbery, 1 year to life; rape, life; rape, life; armed robbery, 1 year to life; and armed robbery, 1 year to life.

Petitioner filed a post-conviction petition in Cook County alleging his plea of guilty was involuntary. The circuit court denied the petition. He appealed that decision to the Illinois Supreme Court. The Supreme Court affirmed the denial, *People v. Granberry*, 45 Ill.2d 11 (1970). Petitioner has filed two petitions for writ of certiorari in the Illinois Supreme Court. Both were denied.

Petitioner has filed the instant habeas corpus petition pursuant to 28 U.S.C. § 2254. Petitioner alleges his denial of parole was in violation of due process and the ex post facto clause of the United States Constitution. In December, 1982, pursuant to *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1981), petitioner was given a new parole hearing. That hearing was continued to January 26, 1983. In January, 1983, his application for parole was denied. In March, 1983, petitioner had another

parole hearing resulting in denial of parole on March 10, 1983.

I. *EX POST FACTO ALLEGATION*

The ex post facto clause prohibits enactment of any law which punishes an act not punishable at the time of its commission or enhances the punishment originally prescribed. *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

The court in *United States ex rel. King v. McGinnis*, 558 F.Supp. 1343, 1345 (N.D.Ill.1983) dealt with the exact contention before this Court. In *United States ex rel. King v. McGinnis*, the court stated:

> In the case at bar, petitioner relies on *Welsh*, *supra*, to support his ex post facto claim. The *Welsh* court held that a prisoner who committed his offenses prior to 1973 could not be denied parole solely on the ground that "release would deprecate the seriousness of the offense." The court found that this criterion, Ill. Rev. Stat. ch. 38, § 1003-3-5(c)(2), enacted in 1973, imported a new factor of general deterrence into the parole release process. *Welsh*, 668 F.2d at 331. Prior to 1973, Illinois law applied special deterrence criteria to parole decisions. This approach focused on the individual, giving significant weight to his behavior while incarcerated and his prospects for rehabilitation. The *Welsh* court reasoned that the parole board's reliance on the new seriousness-of-the-offense criterion as the sole basis for the denial af parole to prisoners convicted before 1973 constituted an after-the-fact enhancement of punishment. *Welsh*, 668 F.2d at 331. Citing the *Weaver* test, *Welsh* concluded that retroactive application of the new general deterrence standard disadvantaged the petitioner, resulting in an ex post facto violation. *Id.*

In light of the foregoing, petitioner's ex post facto allegation must be dismissed. He was not denied parole based on general deterrence criteria. The Prisoner Review Board stated its reasons for denying petitioner parole as follows:

> The Prisoner Review Board in considering your particular case for the possibility of parole noted many factors which include but are not limited to your personal interview, a thorough perusal of your file, the fact that you are serving sentences of 99 years for murder, life for rape (2) and 1-life for armed robbery (4) all crimes involving an assaultive nature against the person.
>
> Your educational achievements and successful participation in various programs are noted and you are encouraged to continue in the same vein.
>
> However, given the period in your life when your gross aberrant behaviour was manifested in such an aggressive manner, the Board feels that release at this time would not be in the best interest of society.
>
> Accordingly, we deny.

It is clear from a reading of the Prisoner Review Board's rationale that they relied on special deterrence criteria not general deterrence criteria as claimed by petitioner. The Board's decision notes petitioner's institutional record, his educational achievements and the nature of the offenses committed and doubt as to his ability to change his behavior from the aggressive manner once displayed.

There is no support in this rationale for the claim that the Board considered these facts with a view toward deterring society in general from committing similar crimes. Therefore, the denial of petitioner's parole request, properly evaluated by special deterrence criteria, does not violate the ex post facto clause. See also, *Walker v. Prisoner Review Board*, 694 F.2d 499

(7th Cir. 1982); *United States ex rel. King v. McGinnis, supra; United States ex rel. Burton v. Klincar*, No. 82 C 7340 (N.D.Ill.Feb. 7, 1983).

II. *DUE PROCESS ALLEGATION*

Petitioner next contends that his denial of parole was in violation of due process.

To determine whether a statement of reasons for denial of parole was constitutionally adequate, the court in *United States ex rel. Scott v. Illinois Parole and Pardon Board*, 669 F.2d 1185, 1190 (7th Cir. 1982), affirmed the test adopted in *United States ex rel. Richardson v. Wolff*, 525 F.2d 797 (7th Cir. 1975). That test, taken from the court's opinion in *United States ex rel. Johnson v. Chairman of New York State Board of Parole*, 500 F.2d 925 (2nd Cir.), was described as follows:

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision . . . and the essential facts upon which the Board's inferences are based.

Scott, 669 F.2d at 1191 (quoting *Johnson*). The *Scott* court, citing *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 200 (1979), further stated that due process does not require the parole board to specify the particular evidence on which it relies. *Scott*, 669 F.2d at 1191.

In the instant case, as previously quoted for the Prisoner Review Board's rationale, petitioner was given an adequate explanation as to the denial of his parole. Respondent submits that this explanation is sufficient to

satisfy the Scott requirement. See *Walker v. Prison Review Board, supra.*

Petitioner's allegation that contractually his parole should be judged by the specific deterrence criteria has been met. As discussed in section one, his parole denial was based on specific deterrence criteria. Thus, this due process claim is clearly without merit and should be dismissed.

Therefore, for the foregoing reasons, respondent respectfully moves that this Court dismiss petitioners' petition for writ of habeas corpus.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

By: /s/ Roger Huebner
ROGER HUEBNER
Assistant Attorney General
500 South Second Street
Springfield, IL 62706
(217) 782-1090

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

REPORT AND RECOMMENDATION

Before the court is Mr. Granberry's Petition for a Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254. He alleges that his denial of parole violated his right to due process of law and the ex post facto clause of the United States Constitution.

The respondent then filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The petitioner then filed a "Response to Motion to Dismiss."

The undersigned United States Magistrate has reviewed these pleadings and motions, as well as the applicable law, and now respectfully submits this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

* * * *

The petitioner, Mr. Granberry, is an inmate at the Vienna Correctional Center. In a well-written literate Petition, Mr. Granberry first notes that in Cook County, in 1960, he received concurrent sentences of 99 years, one-to-life, and life for murder, rape and armed robbery. In the instant petition, he raises one claim: that

> [t]he Board retroactively applied the general deterrence paroling criterion to deny parole until *Welsh v. Mizell*, when the Board began switching rationales, capriciously and arbitrarily. The last parole denial rationale was in the "best interest of society" which, in the context of prior denials, is a re-phrasing of the prohibited general deterrence parole criterion in this case.

Thus, in sum, petitioner argues that *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1981) forbids the utilization of general deterrence criteria in considering the parole request of an inmate who committed his crime prior to 1973.

Subsequent to the filing of the instant petition, however, the Court of Appeals has reversed its earlier *Welsh* decision on this point. *Heirens v. Mizell*, No. 83-1748, United States Court of Appeals for the Seventh Circuit (decided February 24, 1984). The *Heirens*' court stated: "[w]e hold that prior to 1973 the Parole Board possessed broad discretion that allowed it to consider both principles of retributive justice and general deterrence in its parole decisions." *Id.* at p. 18.

The petitioner was denied parole by way of a "Rationale" dated March 10, 1983. [See petitioner's Exhibit 7-N]. The Board concludes that "given the period in your life when your gross aberrent behavior was manifested in such an aggressive manner, the Board feels that release at this time would not be in the best interests of society." The Board also stressed the seriousness of the petitioner's crimes, noting that "all crimes involve[d] an assaultive nature against the person."

This Rationale is constitutionally adequate. We have already referred to the recent *Heirens* decision above. In addition, the Seventh Circuit has also recently held that "it is permissible to consider the relationship of crimes committed to the likelihood of rehabilitation." *Sayles v. Welborn*, United States Court of Appeals for the Seventh Circuit, No. 83-1346 (decided January 11, 1984) (at p. 5).

As the *Heirens*' court noted, "the extent of judicial review of the Parole Board's decision is very narrow. If the Parole Board cites to facts upon which its reasons for denial of parole can be justified, due process is met."

Heirens at p. 33. Clearly, the Board has done this in the instant case.

We agree with the various prison officials and others who have commended Mr. Granberry for his exemplary record while incarcerated. Nonetheless, we must recommend deferrence to the decision of the respondents in this case.

Therefore, for the reasons stated above, it is respectfully recommended that Mr. Granberry's Petition be denied.

Dated this 26th day of March, 1984.

/s/ Gerald B. Cohn
GERALD B. COHN
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

Before the Court is a Report and Recommendation of United States Magistrate Gerald B. Cohn that respondent's Motion to Dismiss be granted. Petitioner has filed an objection to this recommendation, and thus, pursuant to 28 U.S.C. § 636(b)(1)(C) this Court will make a de novo determination of those portions of the recommendation to which objections are made.

Mr. Granberry filed this petition pursuant to 28 U.S.C. § 2254 arguing that the parole board relied on the impermissible criteria of general deterrence when he was denied parole. Petitioner relies on *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982) where the Seventh Circuit held that the general deterrence criteria could not be utilized in cases where an inmate committed the crime prior to 1973. However, the Seventh Circuit reversed itself in *Heirens v. Mizell*, No. 83-1748 (Feb. 24, 1984) where the Court specifically held the parole board can utilize the general deterrence criteria to those inmates who committed crimes prior to 1973. While the Court is impressed with petitioner's efforts to discredit and distinguish *Heirens*, the Court finds these arguments to be without merit.

Accordingly, the Court hereby ADOPTS Magistrate's Cohn's recommendation that respondent's Motion to Dismiss be granted. This action is DISMISSED.

IT IS SO ORDERED.

DATED: April 18, 1984

/s/ James L. Foreman
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that Waldo E. Granberry, petitioner above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order denying habeas corpus relief entered in this action on April 18, 1984.

Dated: May 14, 1984

/s/ Waldo E. Granberry
WALDO E. GRANBERRY, PRO SE
Reg. No. C-6422
Box 100
Vienna, Illinois 62995

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 26, 1985

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. KENNETH F. RIPPLE, Circuit Judge
Hon. WILBUR F. PELL, JR., Senior Circuit Judge

No. 84-1956

WALDO E. GRANBERRY, PETITIONER-APPELLANT,

vs.

LARRY MIZELL, RESPONDENT-APPELLEE.

Appeal from the United States District Court
for the Southern District of Illinois
East St. Louis Division

No. 83 C 3235—Judge James L. Foreman

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Southern District of Illinois, East St. Louis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REMANDED, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-1956

WALDO E. GRANBERRY, PETITIONER-APPELLANT

v.

LARRY MIZELL, RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of Illinois
East St. Louis Division
No. 83 C 3235—James L. Foreman, *Chief Judge*

Argued November 12, 1985—Decided December 26, 1985

Before CUMMINGS, *Chief Judge*, RIPPLE, *Circuit Judge*, and PELL, *Senior Circuit Judge*.

CUMMINGS, *Chief Judge*. Waldo E. Granberry appeals from the district court's denial of his petition for a writ of habeas corpus. He argues that this Court should issue the writ for either of two reasons. First, he claims that the parole criteria that allegedly are being used to deny him parole violate the *ex post facto* clause because the criteria were enacted by the Illinois legislature long after he was sentenced to prison. Second, he asserts that the Illinois Parole Board has acted in such an arbitrary manner as to violate his due process rights. Aside from contesting appellant's claims on the merits, the Illinois

Attorney General asserts for the first time on appeal that appellant has failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b). Appellant counters that in *Heirens v. Mizell*, 729 F.2d 449 (7th Cir.), *certiorari denied*, 105 S. Ct. 147 (1984), this Court, confronting an essentially similar situation, reached the merits after stating that "in any event, respondents have waived any argument regarding exhaustion since they failed to raise this issue in the proceedings before the district court." *Id.* at 457. The statement appellant cites, however, was clearly dictum. It was made only after this Court had specifically found that the petitioner there had in fact exhausted his state remedies when the Illinois appellate court addressed the merits of his *ex post facto* claim. *Id.* In any case, to the extent that *Heirens* can be read as suggesting that the exhaustion requirement may be waived by the failure to assert it in the district court, we disassociate ourselves from that view.

In *United States ex rel. Lockett v. Illinois Parole and Pardon Bd.*, 600 F.2d 116 (7th Cir. 1979), we decided a case in which the state had failed to raise the exhaustion issue either in the district court or in the briefs on appeal. The state raised the issue for the first time at oral argument. Nonetheless, after reviewing the various approaches to the waiver question used by other circuits, we held that there was no bar to our raising the exhaustion issue on our own and remanded the case to the district court with instructions to dismiss for failure to exhaust state remedies. *Id.* at 118.

Subsequent developments have supported the holding in *Lockett* that there is no bar to raising the exhaustion issue *sua sponte*. In fact, in *Mattes v. Gagnon*, 700 F.2d 1096 (7th Cir. 1983), this Court stated that *Rose v. Lundy*, 455 U.S. 509 (1982), which held that a district court must dismiss petitions containing both exhausted and unexhausted claims, not only allowed us to consider the exhaustion issue *sua sponte*, but actually required us to consider the issue *sua sponte*. 700 F.2d at 1098 n.1.

Cases in other circuits support that position. The Tenth Circuit in *Naranjo v. Ricketts*, 696 F.2d 83 (1982), held that because the exhaustion requirement serves the interest of the state courts, it could not be waived by the state prosecutor. Similarly, in *Bowen v. State of Tennessee*, 698 F.2d 241 (1983) (en banc), the Sixth Circuit held that in light of the Supreme Court's emphasis in *Rose v. Lundy*, 455 U.S. 509 (1982), on "the state *courts*' role in the enforcement of the federal law," 698 F.2d at 243 (emphasis in original), the exhaustion rule could not be waived or conceded in the district court and could be noticed *sua sponte* on appeal. The Sixth Circuit subsequently held that although a state had initially opted not to argue exhaustion on appeal, the court not only could consider the exhaustion issue, but was obligated to do so. *See Parker v. Rose*, 728 F.2d 392, 394 (1984). The Ninth Circuit has also held that the district court and a court of appeals may examine the exhaustion question *sua sponte*. *Batchelor v. Cupp*, 693 F.2d 859, 862 (1982) (citing *Campbell v. Christ*, 647 F.2d 956, 957 (9th Cir. 1981)), *certiorari denied*, 463 U.S. 1212 (1983). The First Circuit in *Dickerson v. Walsh*, 750 F.2d 150 (1984), held that the petitioner had not exhausted his state remedies even though Massachusetts had conceded exhaustion in the district court.

The rule in the Fifth and Eleventh Circuits is that the state may waive the exhaustion requirements. *See McGee v. Estelle*, 722 F.2d 1206 (1984); *Thompson v. Wainwright*, 714 F.2d 1495 (1983), *certiorari denied*, 104 S. Ct. 2180 (1984); *see also Purnell v. Missouri Department of Corrections*, 753 F.2d 703, 708-10 (8th Cir. 1985) (following *McGee* and *Thompson*). Those courts allow waiver to occur when the state fails to raise the issue at the proper time. However, they qualify their holdings by allowing an appellate or district court to reject the state's waiver and notice *sua sponte* the lack of exhaustion. *See McGee*, 722 F.2d at 1214; *Thompson*, 714 F.2d at 1509. The rule in those circuits has not

gone without criticism. *See Darden v. Wainwright*, 725 F.2d 1526, 1533-44 (11th Cir. 1984) (en banc) (Tjoflat, J., dissenting). In any event, to the extent that the approach used in those cases might be inconsistent with our holding today, we reject them.

We must now decide whether petitioner has exhausted his state remedies. In *United States ex rel. Johnson v. McGinnis*, 734 F.2d 1193 (7th Cir. 1984), the exhaustion issue was considered in a case in which the material facts were, with one exception, virtually identical to those presented here. We held there that the petitioner had failed to exhaust his state remedies for denial of parole because he had failed to seek a writ of mandamus in the Illinois courts. *Id.* at 1200. The only material difference in this case is that petitioner here did seek a writ of mandamus in the Illinois Supreme Court. That court denied the petitioner's motion "without prejudice to proceeding in any appropriate circuit court for consideration of the question presented." We hold that the petitioner's failure to seek a writ in the lower Illinois courts constitutes a failure to exhaust state remedies.[1] Because of this failure, the cause is remanded to the district court with instructions to dismiss for failure to exhaust state remedies.

A true Copy:

Teste:

/s/ Lupe Calderon, *Deputy*
Clerk of the United States Court of
Appeals for the Seventh Circuit

---

[1] Pursuant to Circuit Rule 11, appellant's counsel has brought *Inglese v. United States Parole Commission*, 768 F.2d 932 (7th Cir. 1985), to our attention. In light of our disposition of this case, it is unnecessary for us to consider what impact, if any, that *Inglese* would have on the merits of this case.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 28, 1986

Before
HON. WALTER J. CUMMINGS, *Chief Judge*
HON. KENNETH F. RIPPLE, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Senior Circuit Judge*

No. 84-1956

WALDO E. GRANBERRY, PETITIONER-APPELLANT

vs.

LARRY MIZELL, RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of Illinois
East St. Louis Division

No. 83 C 3235—James L. Foreman, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by petitioner-appellant, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judge Pell terminated his participation in this case as of December 31, 1985, and did not vote on the petition for rehearing.

SUPREME COURT OF THE UNITED STATES

No. 85-6790

WALDO E. GRANBERRY, PETITIONER

v.

JIM W. GREER, Warden

ORDER ALLOWING CERTIORARI

Filed October 6, 1986

The motion of petitioner for leave to proceed *in forma pauperis* and the petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

Justice Scalia took no part in the consideration or decision of this petition.

No. 85-6790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

v.

JIM GREER, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR THE PETITIONER

HOWARD B. EISENBERG
(Appointed by this Court)
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901
(618) 536-4423
Attorney for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

40pp

QUESTIONS PRESENTED

1. Whether, in a habeas corpus proceedings brought by a state prisoner pursuant to 28 U.S.C. § 2254, the state forfeits the defense of non-exhaustion of state court remedies by failing to raise that issue in the district court.

2. Whether Petitioner exhausted his state court remedies by presenting the issue raised in his federal petition to the state's highest court in an original mandamus action and, in any event, whether further recourse to state courts would be futile under the facts of this case.

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 24-27) is reported as *Granberry* v. *Mizell*, 780 F.2d 14 (7th Cir. 1985). The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing en Banc (J.A. 28) and the order of the district court (J.A. 21) are not reported.

JURISDICTION

The judgment of the Court of Appeals (J.A. 23) was entered on December 26, 1985. The Petition for Rehearing and Suggestion for Rehearing en Banc was denied on February 28, 1986 (J.A. 28). The Petition for a Writ of Certiorari was filed on April 28, 1986 and was granted on October 6, 1986, 107 S.Ct. 62 (J.A. 29). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 28, United States Code

Section 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

. . .

(3) He is in custody in violation of the Constitution or Laws or treaties of the United States;

. . .

Section 2254. State Custody; remedies in Federal Court.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the States, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoners.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

. . .

Constitution of Illinois 1970

Article V, Section 15. Attorney General-Duties

The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.

Illinois Revised Statutes (1985)

Chapter 14, Paragraph 4

The duties of the attorney general shall be—

. . .

Third—To defend all actions and proceedings against any state officer, in his official capacity, in any of the courts of this state or the United States.

STATEMENT OF THE CASE

Waldo Granberry (hereinafter referred to as "Petitioner") was convicted in the circuit court of Cook County, Illinois on June 23, 1960 of murder and other offenses, *People* v. *Granberry*, 45 Ill.2d 11, 256 N.E.2d 830 (1970). He remains confined at the minimum security Vienna Correctional Center in southern Illinois serving these sentences. Petitioner has filed several actions contesting the fact that he has been repeatedly denied parole. Specifically, he asserts that the application of statutory parole criteria to his case which were adopted subsequent to the offenses is an *ex post facto* law. In 1981 he petitioned the Illinois Supreme Court to commence an original action for mandamus, asserting that the parole authority improperly applied the new parole criteria to his case. This petition was denied "without prejudice to proceeding in any appropriate circuit court" (J.A. 10), the circuit court being the court of general jurisdiction in Illinois. In 1983 Petitioner commenced a second mandamus action in the Illinois Supreme Court asserting that he was denied his right to due process of law under the United States Constitution because the Illinois parole authorities applied parole criteria to his case which were adopted by the Illinois General Assembly subsequent to his conviction. Petitioner asserted that the application of these parole release criteria to his case operated as an *ex post facto* law. On April 13, 1983 the Illinois court issued the following decision (J.A. 9):

> The portion of the motion by petitioner for leave to file a petition for writ of *mandamus* and for appoint-

ment of counsel is denied. The part of the motion for leave to sue as a poor person is allowed.

On August 10, 1983 Petitioner commenced this action in the United States District Court for the Southern District of Illinois seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He again asserted that the application to his case of parole criteria adopted after the offense and his conviction was an *ex post facto* law. The district court directed the Illinois Attorney General to respond to Granberry's petition (J.A. 11). On August 31, 1983 the Illinois Attorney General filed a Motion to Dismiss the petition for failure to state a claim upon which relief could be granted. The Motion (J.A. 12) and supporting brief (J.A. 13-17) attacked the merits of the petition. No issue concerning exhaustion of state court remedies was raised in the district court by Respondent. On April 10, 1984 the district court, Hon. James L. Foreman, Chief Judge, presiding, entered an Order (J.A. 21) dismissing the action on the merits, relying on the intervening decision of the Court of Appeals in *Heirens* v. *Mizell*, 729 F.2d 449 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984). Neither the district court nor the magistrate considering this case made any mention of exhaustion of state court remedies in their decisions.

Petitioner appealed, and the Court of Appeals appointed counsel. In his brief in the Seventh Circuit Respondent argued for the first time that Petitioner failed to exhaust state court remedies. Petitioner responded that the most recent Seventh Circuit precedent held that the failure to raise exhaustion in the district court constituted waiver, *Heirens* v. *Mizell*, 729 F.2d 449, 457 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984). The Court of Appeals decided that in light of this Court's decision in *Rose* v. *Lundy*, 455 U.S. 509 (1982) it was "required . . . to

consider the issue [of exhaustion] *sua sponte*" (J.A. 25). The panel thus determined that the state had not, and could not, waive the issue of non-exhaustion. The panel concluded that Petitioner had not exhausted state court remedies and remanded the cause to the district court with directions to dismiss the petition for failure to exhaust state court remedies (J.A. 26-27).

Following the denial of Petitioner's request for rehearing and rehearing *en banc* (J.A. 28), he sought certiorari review in this Court. On October 6, 1986 this Court granted Petitioner leave to proceed *in forma pauperis* and granted the Petition for Writ of Certiorari (J.A. 29), 107 S.Ct. 62.

SUMMARY OF ARGUMENT

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. In the district court Respondent filed a Motion to Dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure. The question of non-exhaustion of state court remedies was raised in neither the Motion, supporting brief, nor the order of the district court. On appeal the question of exhaustion was raised in a short concluding section of the state's brief. The United States Court of Appeals found that the state could not waive the question of exhaustion and remanded the case to the district court with directions to dismiss the petition without prejudice for failure to exhaust state court remedies. This Court granted certiorari to resolve a conflict among the circuits on the question of whether the state can waive the exhaustion issue. The merits of the instant petition are not before the Court.

A. 1. This Court has consistently viewed the question of exhaustion of state court remedies in a habeas corpus action filed by a state prisoner to be a question of

comity and not jurisdiction, *Ex parte Royall*, 117 U.S. 241, 251 (1886); *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). When Congress included an exhaustion requirement in 28 U.S.C. § 2254(b), it intended only to codify the existing law and not create a jurisdictional exhaustion requirement.

2. The rule of comity underlying the exhaustion requirement in section 2254 must consider the relationship of all aspects of state and federal governments, not merely the relationship between the state and federal judiciaries. While several circuits have concluded that the interests of comity are concerned solely with judicial relationships, such conclusion is inconsistent with the historical concept of "comity" and state-federal relationships in other areas. Particularly analogous is this Court's decision in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 480 (1977) holding that the state could waive federal court abstention required by *Younger* v. *Harris*, 401 U.S. 37 (1971). Refusing to allow the Illinois Attorney General to waive exhaustion on behalf of the State fails to recognize his constitutional role in state government. This Court's decision in *Rose* v. *Lundy*, 455 U.S. 509 (1982), relied upon by the court below, did not consider, and does not address, the question of state waiver of the exhaustion requirement.

3. While there is some question of whether a Motion to Dismiss under Rule 12(b)(6), F.R.C.P. is proper in a section 2254 case, the Respondent here clearly forfeited any exhaustion defense by failing to raise the issue in the district court. Such a conclusion is supported both by precedent construing Rule 12(b)(6) as well as this Court's recent decisions requiring a criminal defendant to show "cause" and "prejudice" for failing to raise an issue at the appropriate point in the proceedings, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Smith* v. *Murray*, 106 Sup.Ct. 2661 (1986).

B. 1. By twice seeking relief in the Illinois Supreme Court, Petitioner has exhausted state court remedies. Under Illinois law mandamus is the proper remedy, and under the facts of this case, it was logical and appropriate for Petitioner to seek relief in the state's highest court. Petitioner gave the state courts of Illinois a fair opportunity to consider the issue, and there is no suggestion that the state supreme court denied relief on a procedural basis.

2. A state prisoner is not required to pursue state court remedies when recourse to state court would be futile. The United States Court of Appeals for the Seventh Circuit determined in 1981 that recourse to Illinois courts on the issues raised by this Petitioner would be futile, *Welsh* v. *Mizell*, 668 F.2d 328, 329 (7th Cir. 1982), *cert. den.*, 459 U.S. 923 (1982). This conclusion is reinforced by the fact that the law on the question has come from the Seventh Circuit, and not the state courts.

Petitioner seeks reversal of the judgment of the Court of Appeals and remand with directions to consider the merits of the habeas courpus petition.

ARGUMENT

I

THE STATE FORFEITED THE DEFENSE OF NON-EXHAUSTION OF STATE COURT REMEDIES BY FAILING TO ASSERT SUCH CLAIM IN THE DISTRICT COURT.

A. The Exhaustion Requirement Of Section 2254 Is A Rule Of Comity And Is Not A Jurisdictional Prerequisite.

Congress has given the federal courts broad power to grant habeas corpus relief to any person "in custody in

violation of the Constitution of law or treaties of the United States," 28 U.S.C. § 2241(c)(3). In construing a predecessor of the present statute, this Court recognized that federal courts' power to grant writs of habeas corpus "is of the most comprehensive character, . . . [i]t is impossible to widen this jurisdiction," *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325, 326 (1868). The federal courts' authority to grant relief to state prisoners, first recognized in *McCardle*, is now codified in 28 U.S.C. § 2254 ("section 2254"). Section 2254(b) provides that a federal court shall not grant relief to a state prisoner "unless it appears that the applicant has exhausted the remedies available in the courts of the States." Since jurisdictional requirements can never be waived, *Zipes* v. *Trans World Airlines*, 455 U.S. 385, 397 (1982), it is first necessary to consider whether the exhaustion requirement of section 2254 is jurisdictional. Petitioner submits that the exhaustion requirement is clearly not jurisdictional.

In *Ex parte Royall*, 117 U.S. 241 (1886) this Court reiterated that federal courts have the jurisdictional authority to grant habeas corpus relief to a state prisoner held in violation of the United States Constitution. The Court concluded, however, that the courts of the United States had discretion not to consider the habeas corpus application immediately. JUSTICE HARLAN emphasized that comity between the state and federal governments is an important factor in considering whether a federal court should exercise its discretion to consider a state prisoner's habeas corpus petition:

> That discretion should be exercised in the light of relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally

> bound to guard and protect rights secured by the Constitution.

Id. at 251. The Court concluded that absent "special circumstances" a state prisoner should be "put to his writ of error from the highest court of the State" before the federal court would grant habeas corpus relief, *id.* at 253.

This Court has considered the exhaustion requirement as "not one defining power but one which relates to the appropriate exercise of power," *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). By the time the Judicial Code of 1948 was adopted this Court had made clear that as a "general rule" federal courts should await exhaustion of state court remedies before entertaining a state prisoner's petition, *Darr* v. *Burford*, 339 U.S. 200 (1950); *Ex parte Hawk*, 321 U.S. 114, 116-117 (1944); *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17-19 (1925). This "general rule" was always subject to the recognition that federal courts had the jurisdictional power to grant such relief absent exhaustion and, indeed, should properly exercise such authority under "special circumstances" without requiring exhaustion, *Frisbie* v. *Collins*, 342 U.S. 519, 521-522 (1952).

When Congress adopted section 2254 as part of the Judicial Code of 1948 (Ch. 646, § 2254, 62 Stats, 869, 967 (1948)) it intended to codify the existing law, H.R. Rep. No. 308. 80th Cong. 1st Sess. A180 (1947) ("[t]his new section is declaratory of existing law as affirmed by the Supreme Court"). The adoption of this statute followed the unsuccessful efforts of the Judicial Conference of the United States to persuade Congress to make exhaustion of state court remedies a jurisdictional prerequisite, *see generally*, Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 Ohio St. L.J. 393, 411-412 (1983).

Subsequent to the codification of the exhaustion requirement, this Court reiterated that federal court jurisdiction is conferred in a habeas corpus action by the mere allegation of unconstitutional restraint, and that exhaustion of state court remedies is not a jurisdictional requirement, *Fay* v. *Noia*, 372 U.S. 391, 420, 426 (1963), *in accord*, *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984).

The proposition that the exhaustion requirement of section 2254 is "a matter of comity" and not a jurisdictional rule was stated most recently in *Rose* v. *Lundy*, 455 U.S. 509, 515-520 (1982). In *Rose* JUSTICE O'CONNOR reviewed the development of the exhaustion requirement and concluded that previous decisions of this Court demonstrate that the policy underlying the exhaustion requirement is to "minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," at 455 U.S. 518, citing *Duckworth* v. *Serrano*, 454 U.S. 1,2 (1981) *(per curiam)*.

Petitioner submits that the current exhaustion requirement is a codification of a rule of comity adopted by this Court a century ago in *Royall*. The intervening cases have consistently reaffirmed the exhaustion requirement as a matter of comity, and not as a matter of jurisdiction. There is no basis to deviate from this principle in the case at bar.

B. The Rule Of Comity Implicates The Entire State-Federal Relationship, Not Merely The Concurrent Jurisdictions Of The Courts.

1. The Circuits Are Divided On The Question Of Whether Comity Looks Only To The Relationship Between Courts Or Relationship Between Sovereigns.

The question of whether the exhaustion requirement can be waived by the state has divided the circuits and has

even resulted in inconsistent decisions within circuits. In this case, for example, the Seventh Circuit held that it was obligated to consider the exhaustion question even in the presence of an explicit waiver by the state (J.A. 25). The panel relied upon two earlier decisions of that court on the question, *United States ex rel. Lockett* v. *Illinois Parole and Pardon Bd.*, 600 F.2d 116 (7th Cir. 1979); *Mattes* v. *Gagnon*, 700 F.2d 1096 (7th Cir. 1983). In 1984, however, the same court ruled that the failure to raise exhaustion in the district court constituted waiver, *Heirens* v. *Mizell*, 729 F.2d 449, 457 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984). Moreover, in two cases decided after the instant case, the Seventh Circuit found that it was not required to reach the exhaustion question *sua sponte*, *United States ex rel. Russo* v. *Attorney General of Illinois*, 780 F.2d 712, 714 n.1 (7th Cir. 1986), *cert. den.*, 106 S.Ct. 2922 (1986); *Mosley* v. *Moran*, 798 F.2d 182, 184 (7th Cir. 1986).

Division among the circuits is predicated upon the question of whether the doctrine of comity relates only to the relationship of federal courts to state courts, or whether comity implicates broader intergovernmental relationships. Those circuits which have found that exhaustion may not be waived by the state have considered exhaustion solely a matter of judicial relationships. This position is exemplified by the Third Circuit's decision in *United States ex rel. Trantino* v. *Hatrack*, 563 F.2d 86, 96 (3rd Cir. 1977), *cert. den.*, 435 U.S. 928 (1978):

> Exhaustion is a rule of comity. "Comity," in this context, is that measure of deference and consideration that the federal judiciary must afford to the co-equal judicial systems of the various states. Exhaustion, then, serves an interest *not* of state prosecutors but state courts. It follows, therefore, that the state court interest which underlies the exhaustion requirement of § 2254(b) *cannot* be conceded or

> waived by state prosecutors—for the state court interest in having "an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" is simply not an interest that state prosecutors have been empowered to yield. (Original emphasis, footnote omitted).

This position is supported by decisions of the First, Sixth, Ninth, and Tenth circuits, *Needel* v. *Scafati*, 412 F.2d 761, 766 (1st Cir. 1969), *cert. den.*, 396 U.S. 861 (1969); *Bowen* v. *Tennessee*, 698 F.2d 241, 242-243 (6th Cir. 1983) *(en banc), but see, Steele* v. *Taylor*, 684 F.2d 1193, 1206 (6th Cir. 1982), *cert. den.*, 460 U.S. 1053 (1983) (recognizing state's waiver of *Rose* v. *Lundy* objection to mixed petition); *Batchelor* v. *Cupp*, 693 F.2d 859, 862 (9th Cir. 1982), *cert. den.*, 463 U.S. 1212 (1983); *Naranjo* v. *Ricketts*, 696 F.2d 83, 87 (10th Cir. 1982).

The view that comity is concerned only with relations between federal courts and those of the state has been rejected by at least four other circuits. In *Thompson* v. *Wainwright*, 714 F.2d 1495 (11th Cir. 1983), *cert. den.*, 466 U.S. 962 (1984) the court concluded that:

> Comity, as reflected in Sec. 2254, undoubtedly promotes the interests of state courts, but this is merely one aspect of comity's broader purpose of maximizing the control that a sovereign state has over its criminal justice system.

The court went on to determine that the state's attorney general had significant interest in the administration of justice in both the state and federal courts and that "[c]omity requires sensitivity, not indifference, to the full spectrum of state interests implicated by federal-state habeas review," *id.*

In *McGee* v. *Estelle*, 722 F.2d 1206 (5th Cir. 1984) *(en banc)*, the court was faced with a case in which the

attorney general stated in the district court that he "believed" petitioner had exhausted his state court remedies. While exhaustion was not raised by the state on appeal, the panel remanded the case with directions to dismiss for failure to exhaust, 704 F.2d 764, 768 (5th Cir. 1983). On rehearing *en banc* the Fifth Circuit found that the state had waived the exhaustion question. Following the Eleventh Circuit's decision in *Thompson*, the Fifth Circuit adopted a broad view of comity and the waiver of the exhaustion question:

> The doctrine of comity arises from the nature of our federal system, the joinder of sovereign states into a single union. Mutual respect among sovereigns for the legislative, executive, or judicial acts of each other constitutes the heart of the doctrine. Considerations of finality, avoiding piecemeal litigation, and preventing disruption of custody also support comity. It would pervert these principles to require a state, in the name of comity, unwilling to endure the expense and delay of a remand to state court if the federal constitution question must ultimately be resolved in a federal forum.

McGee, at 722 F.2d 1210-1211 (footnotes omitted). As one judge has said, "[r]efusing a state the right to waive a benefit conferred in deference to its sovereignty stands sovereignty on its head," *Felder* v. *Estelle*, 693 F.2d 549, 554 (5th Cir. 1982) (Higginbotham, J., concurring). This position finds additional support in decisions of the Fourth and Eighth circuits, *Jenkins* v. *Fitzberger*, 440 F.2d 1188, 1189 (4th Cir. 1971); *Purnell* v. *Missouri Dept. of Corrections*, 753 F.2d 703, 708-710 (8th Cir. 1985); *Kuntzelman* v. *Black*, 774 F.2d 291 (8th Cir. 1985), *cert. den.*, 106 S.Ct. 1474 (1986).

The Second Circuit, like the Seventh, has not spoken with one voice on the exhaustion question. At times the

court has precluded waiver, *United States ex rel. Sostre* v. *Festa*, 513 F.2d 1313, 1314, n.1 (2nd Cir. 1975), *cert. den.*, 423 U.S. 341 (1975); *Gayle* v. *LeFevre*, 613 F.2d 21, 22, n.1 (2nd Cir. 1980), while at other times finding the question of exhaustion to be subject to waiver, *Colon* v. *Fogg*, 603 F.2d 403, 407 (2nd Cir. 1979), *McCarthy* v. *Manson*, 714 F.2d 234, 238 (2nd Cir. 1983) (waiver based in part on unique role of Vermont's Chief State's Attorney under the supervision of the judiciary).

2. There Is No Reasoned Basis For Limiting Comity To Solely An Issue Of Relationships Between Courts.

"The language, structure, legislative history, and pre-Code background of the exhaustion requirement lend virtually no support to the proposition that the requirement was intended to be a limitation on the jurisdiction of the federal courts that cannot be waived, forfeited, or conceded," Note, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, 50 U. Chi. L. Rev. 354, 363-364 (1983). The term "comity" was borrowed from international law, where it was not limited to the relationship between judges. Indeed, in considering "comity" in the context of international law, this Court has explicitly defined the concept to mean "[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our great est jurists have been content to call 'the comity of nations,'" *Hilton* v. *Guyot*, 159 U.S. 113, 163, (1895), *see also*, *United States ex rel. Trantino* v. *Hatrack*, 563 F.2d at 103 (Gibbons, J. dissenting). Clearly, the original notion of "comity" extended to the action of the executive and legislative branches of government, and was not limited to the relationship among judges.

In dealing with other cases involving "comity" this Court has not looked merely to judicial relationships. In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) state prisoners brought a civil rights action under 42 U.S.C. § 1983 seeking to restore good time credits. This Court concluded that restoration of good time, which would reduce the duration of confinement, could only be brought in federal court in a section 2254 habeas corpus action after exhaustion of state remedies. The prisoners argued that the exhaustion requirements of section 2254(b) should apply only when the challenge was to state *court* action, citing the very cases relied upon by those circuits which have found the exhaustion requirement to be a rule relating solely to judicial relationships, Brief for Respondents, at 12-14, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). This Court rejected such a narrow view of comity:

> The rule of exhaustion in federal habeas corpus action is rooted in considerations of federal-state comity. That principle was defined in Younger v. Harris, 401 U.S. 37, 44, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), as "a proper respect for state functions," and it has as much relevance in areas of particular state administrative concerns as it does where state judicial action is being attacked.

Id. at 491.

In a later case, involving abstention under *Younger*, the state had urged abstention in the district court, but failed to raise the issue on appeal. The Court concluded that "[i]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system," *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 480 (1977). This same rational should apply to the exhaustion requirement found in section 2254, *Felder* v. *Estelle*,

693 F.2d 549, 553-554 (5th Cir. 1982); 17 Wright & Miller, *Federal Practice and Procedure*, § 4264, at 654.

3. Allowing The State To Waive Exhaustion Is Consistent With Decisions Of This Court In Analogous Areas Of The Law.

Petitioner further submits that allowing for waiver of the exhaustion question by the state's attorney general is consistent with decisions of this Court allowing waiver in analogous areas. As noted above, in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 480 (1977) this Court allowed the State to waive the judicially created abstention doctrine adopted in *Younger* v. *Harris*, 401 U.S. 37 (1971) to prevent conflict between the state and federal governments.

Similarly, the Court has recognized that the Eleventh Amendment's prohibition against federal courts from hearing private suits against state government "is a personal privilege which it may waive at pleasure," *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883); *see also*, *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 186 (1964); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 465 (1945); *Missouri* v. *Fiske*, 290 U.S. 18, 24 (1933).

In *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975) the Court was concerned with the question of exhaustion of administrative remedies by Social Security claimants. Notwithstanding the fact that exhaustion of administrative remedies was a prerequisite to federal court jurisdiction in Social Security cases, this Court determined that the Secretary of the Department of Health, Education, and Welfare could waive the exhaustion requirement. *See also*, *Mathews* v. *Diaz*, 426 U.S. 67, 76 (1976). In cases which involve other than jurisdictional questions, lower courts have regarded exhaustion of

administrative remedies as subject to government waiver, *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023, 1033-1034 (5th Cir. 1982); *Dougherty* v. *Bell*, 694 F.2d 78, 80 (5th Cir. 1982); *Mitchell* v. *United States*, 229 Ct.Cl. 1, 664 F.2d 265, 276 (Ct.Cl. 1981), *aff'd.*, 463 U.S. 206 (1983). Finally, this Court has indicated that the federal government may waive venue, *Panhandle E. Pipe Line Co.* v. *Federal Power Comm'n.*, 324 U.S. 635, 639 (1945)

These cases all support the proposition that counsel for the state or federal government can waive a right or defense, particularly those rights which were intended to protect the state or federal government from premature intervention of the federal judiciary. While the early cases of this Court do include language referring to comity as the relationship among courts, there is no indication that such precedent was intended to mean that exhaustion of state court remedies applied only to action by the state judiciary. The origins of the comity doctrine as well as its application by this Court in other areas of the law clearly repudiate the contention that comity is limited to merely the question of concurrent jurisdiction of state and federal courts.

4. Prohibiting The Illinois Attorney General From Waiving Exhaustion Of State Court Remedies Fails To Recognize His Authority Under Illinois Law.

The Respondent in this case has at all times been represented by the Attorney General of Illinois. In Illinois the Attorney General is a constitutional officer, Constitution of Illinois 1970, Article V, § 15. He is given plenary authority by the Illinois General Assembly to represent the state and its officers, Illinois Revised Statutes (1985), Chapter 14, Para. 4. Unlike the justices of the Illinois Supreme Court, the Attorney General is elected on a

statewide basis. It is he who represents state officials in *both* state and federal courts. It is his office that is aware of the developing law in the area of inmates' rights, criminal procedure, and civil rights. As the Fifth Circuit noted in *McGee* v. *Estelle*, 722 F.2d 1206, 1212 (5th Cir. 1984) (*en banc*):

> As the chief legal officer of the state, the attorney general is the appropriate person to assert, or to waive, the state's right first to determine a claim that the state is holding a person in custody in violation of his federal constitutional rights.

As will be developed in the subsequent sections of this Brief, the Attorney General recognized that this case was governed by federal precedent, and that it could, and should, be most expeditiously resolved in the federal courts. He did not raise an exhaustion claim in the district court and raised the issue only in the closing two pages of his brief in the Seventh Circuit, after he had extensively briefed the merits of this case. The Attorney General made a rational strategic decision in this case not to raise the exhaustion question in the district court. Viewing comity without reference to the authority and role of the Illinois Attorney General seriously denigrates his constitutional authority and unnecessarily increases the friction between the state and federal governments. Such lack of deference to the Attorney General's strategic decision in thus inconsistent with the application of the comity principles expressed in *Rose* v. *Lundy*, 455 U.S. at 518.

5. Nothing In This Court's Decision In *Rose* v. *Lundy* Precludes State Waiver Of The Exhaustion Requirement.

The Court of Appeals concluded that this Court's decision in *Rose* v. *Lundy*, 455 U.S. 509 (1982) requires a federal court to make a *sua sponte* determination of

exhaustion and to dismiss the petition if it finds a lack of exhaustion. Petitioner submits that no such requirement was suggested or intended in *Rose*. Indeed, the Court of Appeals seems to have read *Rose* to elevate the concept of exhaustion to a jurisdictional requirement. As Petitioner has shown in the initial section of this Brief, this is clearly not the law. Indeed, in *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984), a case decided after *Rose*, this Court reinterated that the exhaustion requirement of section 2254 is not jurisdictional.

In *Rose* the Court adopted a "total exhaustion" rule whereby the district court was required to dismiss without prejudice a 2254 petition if it contained both exhausted and unexhausted claims. In *Rose* the state vigorously pressed the exhaustion question. Obviously, no question of waiver was presented in that case. In fact, the Fifth Circuit has held that "waiver by a state of exhaustion arguably removes from a mixed petition the defect which *Rose* v. *Lundy* forbids," *Burns* v. *Estelle*, 695 F.2d 847, 853 n. 2 (5th Cir. 1983). The Sixth Circuit, while generally holding that the exhaustion requirement can not be waived, has held that under *Rose* the state can waive exhaustion by failing to object to a mixed petition in the district court, *Steele* v. *Taylor*, 684 F.2d 1193, 1206 (6th Cir. 1982), *cert. den.*, 460 U.S. 1053 (1983).

In *Rose* JUSTICE O'CONNOR reiterated the familiar policies for exhaustion including affording the "opportunity to the state courts to correct a constitutional violation," at 455 U.S. 518, *citing*, *Darr* v. *Burford*, 339 U.S. 200, 204 (1950). The Fifth and Eleventh Circuits read this language in *Rose* to authorize state waiver of exhaustion, *McGee* v. *Estelle*, 722 F.2d at 1212; *Thompson* v. *Wainwright*, 714 F.2d at 1505.

Petitioner submits that *Rose* simply does not speak to the question of waiver. It is helpful to the instant discussion only to the extent it reformulates the basic question. Under *Rose* the question becomes how the state's "opportunity" to exercise state court jurisdiction need be decided. Must state courts be given that "opportunity," or may the state's elected attorney general determine that the state's best interests are served by litigating the issue in federal court. Petitioner respectfully submits that the Court of Appeals read into *Rose* a rule forbidding waiver of exhaustion that is contained neither in the language of the Court's opinion nor was fairly presented by the facts of that case.

C. Respondent Has Forfeited Any Exhaustion Defense By Failing To Assert Such Claim In The District Court.

1. Respondent Should Be Bound By His Failure To Raise Exhaustion In The District Court.

In the district court the Attorney General of Illinois did not expressly waive nor concede exhaustion of state court remedies. In response to the Order to Show Case (J.A. 11) the Attorney General filed a Motion to Dismiss (J.A. 12) going to the merits of the petition and made no reference to exhaustion in either the Motion or his supporting brief (J.A. 13-17). There is a question of whether the State's Motion to Dismiss is an appropriate pleading in view of Rule 5 of the Rules Governing 28 U.S.C. Section 2254 Proceedings ("Rule 5"') which requires that the respondent "state whether the petitioner has exhausted his state remedies." Several courts have held that the failure to mention exhaustion in the state's responsive pleading coupled with a request to deny relief on the merits constitutes waiver of the exhaustion issue, *Pennington* v. *Spears*, 779 F.2d 1505, 1506 (11th Cir. 1986); *Truitt* v. *Jones*, 614 F.Supp. 1342, 1346 (S.D. Ga. 1985), *aff'd*, 791 F.2d 940 (11th Cir. 1986); *see also*, *Goins* v. *Allwood*, 391 F.2d 692, 693 (5th Cir. 1968) (under predecessor statute). Petitioner submits that by the Respondent's failure to raise exhaustion in his "Motion to Dismiss" and by requesting the district court to dispose of the merits of the petition the exhaustion issue has been forfeited by the State.

The circuits are divided on the question of whether the state's failure to raise exhaustion in the district court constitutes waiver[1] of the defense. Some courts have found that even though the prosecutor failed to raise the claim, it could be considered, *Strader* v. *Allsbrook*, 656 F.2d 67, 68 (4th Cir. 1981); *Campbell* v. *Crist*, 647 F.2d 956, 957 (9th Cir. 1981); *Gayle* v. *LeFevre*, 613 F.2d 21, 22, n. 1 (2nd Cir. 1980); *Davis* v. *Campbell*, 608 F.2d 317, 320 (8th Cir. 1979). Other courts have found that by failing to assert the exhaustion claim in a timely manner, it was waived, *Shaw* v. *Boney*, 695 F.2d 528, 529 n. 1 (11th Cir. 1983); *Hopkins* v. *Jarvis*, 648 F.2d 981, 983 n. 2 (5th Cir. 1981); *Messelt* v. *Alabama*, 595 F.2d 247, 250-251 (5th Cir. 1979); *United States ex rel. Graham* v. *Mancusi*, 457 F.2d 463, 467 (2nd Cir. 1972). Commentators are also divided on the question, at least one taking the position that the failure of the state to raise exhaustion should not be

---

[1] The issue here is not truly one of "waiver," which requires "an intentional relinquishment or abandonment of a known right," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), but of stage preclusion which "demands that a right be asserted during the stage to which it is most relevant," Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. Rev. 478, 514-515 (1981). This "waiver" is often considered a "forfeiture," Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977).

presumed to be waiver, Note, *State Waiver of the Exhaustion Requirement in Habeas Corpus Cases*, 52 Geo. Wash. L. Rev. 419, 431 (1984), while others argue that such default constitutes forfeiture of the issue, Yackle, *Postconviction Remedies* 238 (1981); Note, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, at 377-378.

In the instant case it is apparent why Respondent decided not to assert non-exhaustion in the district court, but to seek disposition of the petition on the merits. First, the governing precedent at the time the state filed its response on the merits of the petition was a decision of the Seventh Circuit, *Welsh* v. *Mizell*, 668 F.2d 328 (7th Cir. 1982), *cert. den.*, 459 U.S. 923 (1982). Secondly, the Petitioner had twice sought relief from the Illinois Supreme Court. Thirdly, the district courts in Illinois had already resolved the issue raised in this case against Petitioner, *see*, Brief in Support of Motion to Dismiss, (J.A. 14-16). Finally, Petitioner was not represented by counsel, and it appeared that the case could be quickly disposed of.

The action of the Attorney General in this case was neither ambiguous, erroneous, nor inadvertent, cf. *Davis* v. *Campbell*, 608 F.2d 317, 320 (8th Cir. 1979). His Motion to Dismiss plainly asked the district court to consider and reject the merits of the petition. It was only when the Court of Appeals appointed counsel who raised at least a colorable argument on the merits[2] that the Attorney General reconsidered his decision not to raise an exhaustion defense. This was too late. Counsel made a rational strategic decision not to raise the exhaustion issue, and Respondent should be bound by that decision.

[2] Although the merits of the habeas corpus are not before the Court, Respondent argued in his Brief in Opposition to certiorari that the Petitioner could not prevail on the merits. Petitioner strongly contends that the Seventh Circuit's decision in *Heirens* v. *Mizell*, 729 F.2d 449 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984), overruling *Welsh* v. *Mizell*, 668 F.2d 328 (7th Cir. 1981), was incorrect. He believes that if afforded the opportunity, he can demonstrate that the statute changing the parole criteria is an *ex post facto* law as applied to him.

2. Respondent Conceded Exhaustion Of State Court Remedies By Filing A Motion To Dismiss Under Rule 12(b)(6), F.R.C.P.

Respondent alleged in his Motion to Dismiss that Petitioner failed to state a claim upon which relief may be granted and that pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure (F.R.C.P.), this action should be dismissed (J.A. 12).

Rule 81(a)(2), F.R.C.P., provides that the Rules are applicable to habeas corpus proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." In *Harris* v. *Nelson*, 394 U.S. 286 (1969) the Court held that civil discovery rules were not applicable in habeas corpus proceedings, and that separate rules governing 2254 actions "would promise much benefit," 394 U.S. at 300, 301, n. 7. Such separate rules were promulgated in 1976 and as amended by Congress, were enacted effective February 1, 1977, Pub. L. 94-426, 90 Stat. 1334 (1976). Given the adoption of such separate rules, "it may be doubted that in cases covered by Section 2254 . . . the 'conformity' provisions in Rule 81(a)(2) has any continuing significance," 7 *Moore's Federal Practice*, ¶81.04[4] at 81-54. *See also*, *Pitchess* v. *Davis*, 421 U.S. 482 (1975) (holding that Rule 60(b), F.R.C.P., providing for relief from judgment, does not apply in a section 2254 habeas corpus action).

The application of the Federal Rules of Civil Procedure to section 2254 cases is nevertheless unclear. In *Blackledge* v. *Allison*, 431 U.S. 63 (1977) the Court determined

that a motion for summary judgment under Rule 56, F.R.C.P. was proper in a 2254 cases, while in *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 272 (1978) (Blackmun, J. concurring) there is the suggestion that Rule 60, F.R.C.P. also applies in section 2254 cases. At least one court has found "the application of Federal Rules of Civil Procedure to habeas cases is a persistent and perplexing problem," *Hillery* v. *Pulley*, 553 F.Supp. 1189, 1196 (E.D. Calif. 1982).

If this matter were in the district court, Petitioner would move to strike the 12(b)(6) motion filed by Respondent as being inconsistent with Rule 5 of the Section 2254 rules, and thereby not applicable to habeas corpus cases under the incorporation language of Rule 81(a)(2), F.R.C.P. Once such a motion has been filed and accepted by the district court, however, the allegations of the petition should be construed favorably to the pleader, *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974), and its allegations taken as true, *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-422 (1969). Petitioner clearly alleged in his pleading that he had exhausted state court remedies (J.A. 5-6). Thus by filing a 12(b)(6) motion, Respondent conceded exhaustion just as much as if he had specifically and explicitly waived the issue.

While Petitioner believes that a 12(b)(6) motion does not lie in a section 2254 case, the failure of Respondent to file a answer which complies with Rule 5 should not delay disposition of this case at this juncture in the proceedings. By any account, the manner in which the Respondent replied to the petition is a waiver of the exhaustion question.

3. Requiring A State Attorney General To Raise The Issue Of Non-Exhaustion Of State Remedies In The District Court Is Most Consistent With Decisions Of This Court Holding Criminal Defendants Bound By The Procedural Defaults Of Their Attorneys.

In the past decade, beginning with *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), this Court has foreclosed federal habeas corpus review of a criminal conviction in which the defendant has failed to take some required action at a more preliminary stage in the proceedings, unless the petitioner can show "cause" for the default as well as any "prejudice" attributable thereto, *see also*, *Engle* v. *Isaac*, 456 U.S. 107 (1982) and *Francis* v. *Henderson*, 425 U.S. 536 (1976). This line of cases culminated last term in the decisions in *Murray* v. *Carrier*, 106 S.Ct. 2639 (1986) and *Smith* v. *Murray*, 106 S.Ct. 2661 (1986) wherein this Court concluded that neither the inadvertence nor tactical decision of counsel would relieve a criminal defendant of the procedural default resulting from the attorney's failure to take action at the appropriate stage in the proceedings.

Here the Illinois Attorney failed to comply with Rule 5 of the Rules Relating to 2254 Actions. He failed to raise non-exhaustion in either his Motion to Dismiss or supporting brief in the district court. Petitioner submits that the Attorney General of Illinois should be required to meet the same standards of showing "cause" and "prejudice" for his procedural default as would a criminal defendant under the line of cases cited above. The petitioner in *Smith* v. *Murray* was sentenced to death, but he was nevertheless precluded from obtaining complete review of his conviction and sentence due to the inadvertence of his appellate attorney. It would certainly seem reasonable and fair to require the attorneys who represent the State of Illinois in criminal post-conviction pro-

ceedings to meet the same standards as defense attorneys who may have only very limited experience in criminal law, e.g. *United States* v. *Cronic*, 466 U.S. 648 (1984).

Here Respondent manifestly failed to raise the exhaustion issue at the time specified by Rule 5. If a habeas petitioner had failed to raise a constitutional claim in the district court, he would have been barred from raising the claim on appeal, cf. *Dorszynski* v. *United States*, 418 U.S. 424, 431 n. 7 (1974); *Irvine* v. *California*, 347 U.S. 128, 129-130 (1954) (Court need not consider issues not raised in certiorari petition). Petitioner submits that equal application of the "cause" and "prejudice" requirement mandates reversal of the decision of the Court of Appeals.

The exhaustion requirement found in section 2254(b) is a non-jurisdictional rule of comity. The valid concerns of the relationship between the state and federal governments are adequately addressed when the state's constitutional officer, the Attorney General, decides not to contest state court consideration of a state prisoner's habeas corpus petition. The state should be bound by the same rules of pleading, practice, and forfeiture as any other litigant in the federal courts. All of these factors point to but one result: the issue of exhaustion of state court remedies under section 2254(b) may be, and was in this case, forfeited by Respondent.

II

PETITIONER HAS EXHAUSTED HIS STATE COURT REMEDIES AND, IN ANY EVENT, FURTHER RECOURSE TO THE STATE COURTS OF ILLINOIS WOULD BE FUTILE IN THIS CASE.

A. Petitioner Has Exhausted His State Court Remedies.

Under Illinois law mandamus is the proper remedy for attacking the denial of parole, *People ex rel. Abner* v.

Kinney, 30 Ill.2d 201, 195 N.E.2d 651 (1964). Petitioner has twice addressed a mandamus request to the Illinois Supreme Court. In 1981 Petitioner and other inmates at the Vienna Correctional Center filed an action contesting the application of the new parole criteria to them, *People ex rel. Long* v. *Irving*, No. 7023 (Ill. Oct. 30, 1981). That action was denied without prejudice to refiling the action in the state court of general jurisdiction (J.A. 10). In 1983 Petitioner attempted to commence a second mandamus action in the Illinois Supreme Court. In that case the court granted Petitioner leave to sue as a poor person, but denied Petitioner leave to file a petition for writ of mandamus and for appointment of counsel, *People ex rel. Granberry* v. *Illinois Prison Review Board*, No. 7145 (Ill. April 13, 1983) (J.A. 9). In the latter order there was no suggestion that the relief was denied on some procedural grounds, and, unlike the 1981 order, there was no suggestion that Petitioner should seek relief in the trial court. This action was filed several months after the Illinois Supreme Court's second order.

It is important to understand why Petitioner would address an original petition to the state's highest court. The Fifth District of the Illinois Appellate Court has jurisdiction over Johnson County in which Petitioner is confined. In 1980 that court specifically rejected the *ex post facto* argument advanced by Petitioner, *Harris* v. *Irving*, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980). The Illinois Supreme Court denied discretionary review of the Appellate Court's decision, *leave to appeal denied*, No. 54264 (Ill. Jan. 30, 1981), 82 Ill.2d 584 (1981). Since in Illinois the opinions of the Appellate Court are binding on all state circuit courts, *People* v. *Foote*, 104 Ill.App.3d 581, 432 N.E.2d 1254, 1257 (1st Dist. 1982), it was clear that Petitioner was foreclosed from obtaining relief in either

the circuit or appellate court having jurisdiction over his claim. If he was going to obtain relief from any Illinois court, it was going to have to come from the state supreme court.

In order to exhaust state court remedies, all a state prisoner must do is fairly present his claims to the state courts, *Picard* v. *Conner*, 404 U.S. 270, 275 (1971); there is no requirement that the state court address the merits of the claim, *Smith* v. *Digmon*, 434 U.S. 332, 333 (1978). Here Petitioner twice requested that the Illinois Supreme Court assume jurisdiction of the matter. Each time the court refused.

In concluding that Petitioner had not exhausted his state court remedies, the Seventh Circuit relied on *United States ex rel. Johnson* v. *Mcginnis*, 734 F.2d 1193 (7th Cir. 1984), a case in which the petitioner failed to seek the proper remedy in the state courts. Clearly, this failure is the dispositive distinction between *Johnson* and the case at bar. Here Petitioner twice pursued the correct remedy in state courts, while in the case relied upon by Respondent and cited by the Court of Appeals no such applications were filed. In *Johnson* there was clearly no exhaustion; here there was.

Secondly, the court below incorrectly stated that the Illinois Supreme Court had directed the Petitioner to seek relief in the circuit court (J.A. 27). The language quoted by the Seventh Circuit appeared not in the 1983 order of the Illinois Supreme Court (J.A. 9), but in the 1981 order (J.A. 10). The governing writ should obviously be the latest action of the state supreme court which includes no suggestion of other remedies or other courts.

There is no indication that the Illinois Supreme Court denied relief on any procedural basis whatsoever. While it

is true, of course, that a state prisoner does not exhaust state remedies by pursuing the wrong procedural remedy, *Williams* v. *Wyrick*, 763 F.2d 363 (8th Cir. 1985) (motion to recall mandate not proper procedure to evaluate prisoner's constitutional claims), here there is no question but that Granberry pursued the correct remedy. Absent a showing on the record that the state court denied relief on procedural grounds, this Court should presume denial on the merits, *Bell* v. *Watkins*, 692 F.2d 999, 1006 (5th Cir. 1982), *cert. den.*, 464 U.S. 843 (1982); *Ross* v. *Craven*, 478 F.2d 240, 241 (9th Cir. 1973); *Castro* v. *Klinger*, 373 F.2d 847, 848 (9th Cir. 1967).

In this case Petitioner pursued the correct remedy in the appropriate court, and that court denied relief on the merits. The Court of Appeals erred in concluding that Petitioner had not exhausted his state court remedies.

B. Further Recourse To The State Courts Of Illinois Would Be Futile.

A state prisoner is not required to pursue state court remedies for the purposes of exhaustion under section 2254 if recourse to state court would be futile, *Duckworth* v. *Serrano*, 454 U.S. 1, 3 (1981); *United States ex rel. Buckhana* v. *Lane*, 787 F.2d 230, 235 (7th Cir. 1986); *Brand* v. *Lewis*, 784 F.2d 1515, 1517 (11th Cir. 1986); *Allen* v. *Perini*, 424 F.2d 134, 139 (6th Cir. 1970), *cert. den.*, 400 U.S. 906 (1970).

Ironically, five years ago the United States Court of Appeals for the Seventh Circuit found that it was futile for an Illinois prisoner to raise this precise issue in state court, *Welsh* v. *Mizell*, 668 F.2d 328, 329 (7th Cir. 1982), *cert. den.*, 459 U.S. 923 (1982). The panel in the present case made no reference to the determination of futility in *Welsh*.

Manifestly, recourse to Illinois courts would be futile. As noted in the preceding section of this Brief, the appellate court with jurisdiction over Petitioner has resolved this case against him, thus barring relief in any Illinois court other than the state supreme court. More importantly, this is a case in which the definitive precedent has come from the United States Court of Appeals for the Seventh Circuit. In *Welsh* that court held the retroactive application of statutory parole criteria to be an *ex post facto* law. Subsequently the court overruled *Welsh* in *Heirens* v. *Mizell*, 729 F.2d 449 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984). Thus even if the Illinois Supreme Court were inclined to consider the matter, it would be faced with direct precedent from the Seventh Circuit on the issue. In light of the adverse determination of the state appellate court, the disinclination of the Illinois Supreme Court to hear the various cases raising this issue, and the fact that the law on this question has come from the federal, and not state, courts, it would surely be an exercise in futility to require the Petitioner to file his third mandamus action in an Illinois court.

CONCLUSION

Petitioner has shown in this Brief that Respondent forfeited his right to contest non-exhaustion of state court remedies by failing to raise that issue in the district court. Even if this Court concludes that there was no waiver of the issue, however, it is apparent that Petitioner has, in fact, exhausted his state court remedies and that further recourse to Illinois courts would be futile.

For the reasons specified herein, Petitioner respectfully prays that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed and the cause remanded with directions to consider the merits of the petition for writ of habeas corpus.

Respectfully submitted,

HOWARD B. EISENBERG
(Appointed by this Court)
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901
(618) 536-4423
Attorney for Petitioner

No. 85-6790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

vs.

JIM GREER, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA J. STEWART
Solicitor General, State of Illinois
MARK L. ROTERT *
TERENCE M. MADSEN
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Attorneys for Respondent

* Counsel of Record

Printed by A

49pp

QUESTIONS PRESENTED

1. Whether, in a habeas corpus proceeding brought by a state prisoner pursuant to 28 U.S.C. §2254, the state forfeits the defense of non-exhaustion of state court remedies by failing to raise that issue in the district court.

2. Whether Petitioner exhausted his state court remedies by presenting the state's highest court with a motion for leave to file a petition for writ of mandamus, when denial of the motion does not constitute a decision on the merits and where further recourse to state courts is not shown to be futile.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

vs.

JIM GREER, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

In addition to those items set forth in petitioner's brief, respondent relies on the following constitutional provision and statute:

Constitution of Illinois (1970)
Article 6, Section 4(a)

> The Supreme Court may exercise original jurisdiction in cases relating to revenue, mandamus, prohibition or habeas corpus and as may be necessary to the complete determination of any case on review.

Illinois Revised Statutes (1985)
Chapter 14, Paragraph 5(4)

The duty of each state's attorney shall be:

(4) To defend all actions and proceedings brought against his county, or against any county of State officer, in his official capacity, within his county.

STATEMENT OF THE CASE

The Statement of the Case contained in petitioner's brief adequately sets forth the historic facts necessary for resolution of the questions presented, subject to the following additions:

1. The petition for writ of habeas corpus alleged a denial of due process as well as an *ex post facto* claim. (J.A. 11)

2. The action was dismissed on April 18, 1983. A certificate of probable cause was denied by the district court on May 31, 1983. A certificate of probable cause was granted and counsel was appointed by the court of appeals on January 25, 1985. On March 25, 1985, Judge Bua of the United States District Court for the Northern District of Illinois, Eastern Division, dismissed an unrelated Section 2254 petition for failure to exhaust available state court remedies, ruling that denial of a motion for leave to file a petition for writ of mandamus in the Illinois Supreme Court did not satisfy the exhaustion requirement. The brief for the respondent was filed in the court of appeals on May 10, 1985. Because of the relevance of that holding, a copy of Judge Bua's unreported opinion in *U.S. ex rel. Carbona v. Huch*, No. 85 C 1750 (N.D. Ill.) is attached as Appendix 2 to this Brief.

SUMMARY OF ARGUMENT

Although federal courts clearly have subject-matter jurisdiction to grant writs of habeas corpus to prisoners in state custody, that jurisdiction is subject to the precepts of the exhaustion doctrine. Because the exhaustion doctrine promotes the crucial concepts of comity and federalism, it admits of only two narrow exceptions, neither of which is present in this case.

The exhaustion doctrine furthers the legitimate goals of fostering state court participation in the development of federal constitutional litigation, and serves essential purposes of comity and federalism:

1) by reducing friction between state and federal courts by allowing state courts the first opportunity to pass upon and correct alleged violations of constitutional law;
2) by avoiding disruption of the orderly progression of state issues and cases;
3) by allowing state courts to participate in the development and application of federal constitutional law; and
4) by helping to develop a sense of increased respect for the United States Constitution within the state courts.

In addition, the rule serves federal judicial economy by allowing the opportunity for refinement of issues and full factual development and by allowing the resolution of meritorious claims before the cases come to the federal forum.

As such, it directly implicates the parallel interests of the federal and state judiciaries, interests which may not be waived or forfeited by members of a state's execu-

tive branch. In this case, wherein petitioner has clearly failed to avail himself of an existing state remedy, it would be inappropriate to deny the State of Illinois the opportunity to assert their defenses under the exhaustion doctrine because of the failure to assert those defenses in an initial answer to a petition for habeas corpus.

Moreover, even if an express effort were made to forego exhaustion defenses by a state official, no caselaw of this Court or statutory authority will support petitioner's claim that such defenses are waived upon the respondent's unilateral decision that some other interest outweighs the considerations underlying exhaustion. At most, an express effort to waive the exhaustion defenses by respondent's counsel would permit a federal court to evaluate whether such a waiver satisfies any of the narrow exceptions to the doctrine itself. In no event may the doctrine's goals be declared forfeit merely by silence, for such would nullify a doctrine designed to foster broader notions of federalism and comity.

Finally, because it is apparent that the petitioner in this case has failed to exhaust available state remedies, the decision of the court of appeals dismissing his petition on that basis must be affirmed.

ARGUMENT

I.

THE RESPONDENT DID NOT FORFEIT APPLICATION OF THE EXHAUSTION REQUIREMENT BY FAILING TO ASSERT AN EXHAUSTION DEFENSE IN THE DISTRICT COURT.

For fully a century this Court has insisted that state prisoners seeking federal habeas corpus relief (28 U.S.C. § 2254) must first present their constitutional claims to the state courts wherein they were convicted. This concept, referred to as the exhaustion doctrine, promotes crucial interests of comity and federalism in an area where the potential for friction between the state and federal judicial systems is particularly high. Because of its importance, the exhaustion doctrine is rigidly enforced and has been held subject to only two narrow exceptions.

The petitioner in the case at bar, having failed to exhaust an available state remedy before applying for federal habeas corpus relief, now urges upon the Court a third exception, not heretofore established by any decision of this Court. He submits that the exhaustion requirements need not apply where there has been an explicit waiver, or indeed even an inadvertent forfeiture, of the benefits of that doctrine by counsel for a respondent state official.

Such a novel exception finds no historical support in the habeas corpus statute or the precedent of this Court. Worse, it runs counter to the underlying principles fostered by the doctrine itself. As such, it is imperative that this Court continue its tradition of consistent adherence to the exhaustion doctrine.

A.

The Historical Development Of The Exhaustion Doctrine Recognized Only Two Exceptions To That Requirement, Neither Of Which Is Present Here.

When this Court established the exhaustion requirement in *Ex Parte Royall*, 117 U.S. 241, 250-251 (1886), it explained that, while federal courts have discretionary jurisdiction upon writ of habeas corpus to inquire into the basis of custody on state authority,

> that discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

Id.

Twelve years later this Court observed in *Baker v. Grice*, 168 U.S. 284, 290 (1898), *overruled on other grounds, Hensley v. Municipal Court*, 411 U.S. 345, 351, n.8 (1973), that the development of the caselaw since *Royall* made it appear clearly that "as the settled and proper procedure" federal courts "ought not to exercise [their habeas corpus] jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency. . ." *See also New York v. Eno*, 155 U.S. 89 (1894); *Minnesota v. Brundage*, 180 U.S. 499, 502 (1901). Shortly thereafter, this Court briefly discussed the requirement and flatly asserted that federal courts will intervene by writ of habeas corpus in advance of final action by the highest court of the state "only in certain exceptional cases." *Reid v. Jones*, 187 U.S. 153, 154 (1902).

The exhaustion requirement and its lone exception based on peculiar urgency were reiterated and strengthened in *Urquhart v. Brown*, 205 U.S. 179 (1907). *Urquhart*, like this case, involved a challenge, not to trial error, but to the constitutional validity of a state statute. In *Urquhart*, this Court explained that the exceptional cases in which exhaustion may not be required

> are those of great urgency that require to be promptly disposed of, such, for instance, as cases involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations.

Urquhart, 205 U.S. at 182.

In *Rose v. Lundy*, 455 U.S. 509, 516 (1981) this Court observed that this was the state of the exhaustion requirement, as expressly reflected in *Ex Parte Hawk*, 321 U.S. 114, 117 (1944), when it was codified as part of the Judicial Code of 1948 (ch. 646, § 2254, 62 Stats., 869, 967 (1948)). The narrow special circumstances contemplated by *Urquhart* have seldom been found by this Court. *See e.g., Ohio v. Thomas*, 173 U.S. 276 (1899) (finding exception where imprisonment of federal officer may have impeded operations of federal government); *Re Neagle*, 135 U.S. 1 (1890) (finding exception where deputy U.S. Marshall committed killing in exercise of his duty of protecting supreme court justice); *Minnesota v. Brundage*, 180 U.S. 499 (1901) (no exception where state court action may be inconsistent with decisions of this Court or where case involves issue of business or public interest).

In *Duckworth v. Serrano*, 454 U.S. at 1, 2-3 (1981) (*per curiam*), this Court made clear that even a "clear violation of a petitioner's rights," coupled with an interest in judicial economy, will not excuse exhaustion. The *Serrano* Court interpreted *Ex Parte Royall* and its progeny as allowing

circumvention of the exhaustion requirement where the state courts provide no opportunity for redress, or where the state "corrective process is so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano, supra,* 454 U.S. at 3. Subsequent to *Serrano,* however, the decision in *Rose* drew from the language of *Hawk* to make clear that the futility exception discussed in *Serrano* is a separate concept from exceptional circumstances of peculiar urgency. *Rose, supra,* 455 U.S. at 516, n.7.

The second narrow exception to the exhaustion requirements of *Royall* is referred to as the "futility exception", a term which has been used to describe two slightly different concepts. The narrower view of "futility" is applied in cases where the highest state court has recently addressed the issue and decided it adversely to petitioner in the absence of any intervening decision of this Court or any other indication that the state court is likely to change its position. *See Sweet v. Cupp,* 640 F.2d 233, 236 (9th Cir. 1981) (discussing the futility exception and its purpose). A slightly broader test of futility is expressed in *Duckworth v. Serrano,* where this Court explained that the exception is made "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."

In any event, futility and exceptional circumstances, however defined, are the only two narrow exceptions this Court has recognized to the exhaustion requirement. In all other cases, even though the requirement is not truly jurisdictional, the exhaustion requirement has been rigidly enforced by this Court. Petitioner asks this Court to create yet a third exception based on the supposedly implicit representation by counsel for respondent that other con-

cerns or state interests should excuse the requirement. This Court's unwavering insistence on enforcement of the exhaustion requirement is well-founded in view of the importance of the considerations underlying the requirement and should not yield to petitioner's request.

B.

The Interests Promoted By The Exhaustion Doctrine Are Essential To The Maintenance Of An Orderly Federal System, And Would Be Defeated If Concepts Of Waiver Or Forfeiture Were Allowed To Excuse Adherence To That Doctrine.

The exhaustion requirement serves at least four essential purposes of comity and federalism:

1) by reducing friction between state and federal courts by allowing state courts the first opportunity to pass upon and correct alleged violations of constitutional law;
2) by avoiding disruption of the orderly progression of state issues and cases;
3) by allowing state courts to participate in the development and application of federal constitutional law; and
4) by helping to develop a sense of increased respect for the United States Constitution within the state courts.

This Court has recently explained that "[t]he exhaustion doctrine is principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose v. Lundy,* 455 U.S. 509, 518 (1981); *See also Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 490 (1973) ("(e)arly federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby

remove their understanding of and hospitality to federally protected interests").

The doctrine also "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*).

Finally, the rule serves federal judicial economy by allowing the refinement of issues and the development of supporting facts before the case reaches the federal forum. The rule also reduces the number of cases presented in federal court by allowing for resolution of meritorious claims by state courts.

Respondent urges this Court to conclude that consideration of these compelling interests should not be foreclosed by forfeiture, or even explicit waiver, based on the conduct of counsel from a state's executive branch, whose interests may or may not be co-extensive with those of the state judiciary. The concerns underlying the exhaustion doctrine require a federal court to consider whether futility or special circumstances exist to justify the exercise of its discretion, even in the face of an explicit waiver of exhaustion by counsel for the respondent. Even an explicit waiver, while a relevant factor to the court's determination, should not strip the court of the ability to exercise its discretion.

In this case, as in most section 2254 cases arising in Illinois,[1] the respondent is warden of a correctional facili-

[1] Had the custodian been one of the 102 county sheriffs in Illinois, he or she would have been represented by the state's attorney for his county. *See* Ill. Rev. Stat. 1985, ch. 14, § 5. *See e.g., People ex rel. Smith v. Elrod*, 511 F. Supp. 559 (N.D. Ill.

(Footnote continued on following page)

ty, an officer of the executive branch; counsel for respondent, an assistant attorney general, was similarly an officer of the executive branch. The Attorney General of the State of Illinois is "the legal officer of the state." Ill. Const. Art. 5, § 15. In that capacity, the Attorney General's duties include that he "defend all actions and proceedings against any state officer, in his official capacity, in any of the courts of this state or in the United States." Ill. Rev. Stat. 1985, ch. 14, § 4. Similarly, in accord with his mandate, the Attorney General represents all of the judges and justices of the Illinois judicial system in their capacity as state officers. In addition, the Attorney General enjoys all of the powers assigned to that office at common law. *See Fergus v. Russell*, 270 Ill. 304, 110 N.E. 130 (1915); *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 359 N.E.2d 141 (1976).

Petitioner argues that the Attorney General, as the chief legal officer of the state, can waive or forfeit the exhaustion requirement because comity is a concept related to federal-state relations overall and not restricted to judicial relationships. He correctly points out that in *Preisser v. Rodriguez*, 411 U.S. 475, 491 (1973), this Court explained that considerations of comity have relevance beyond the case where state judicial action is being attacked. That observation, however, does not alter or extinguish the particularized concerns of comity and federalism when it is a judicial action that is in issue.

As a broad generalization, it is true that the concepts of comity and federalism implicate the relationship between

[1] *continued*
1981). Although individual county prosecutors may occasionally appear as counsel for respondent in a section 2254 proceeding, they are not statutorily empowered to speak for the Illinois judiciary as a whole.

the federal government and a sovereign state. But in the specific context of section 2254 cases, the specific interests furthered by the exhaustion doctrine most directly implicate the distinct roles played, in a federal system, by the federal judiciary and the state judiciary. These unique interests are negatively affected by any doctrine which permits a judicial interest to be evaulated and waived by an executive officer.

Petitioner also argues that because the Attorney General is the state's chief legal officer he should be allowed to determine whether the state's interests in comity should be abandoned in the face of other important state interests. He asserts that failure to recognize the Attorney General's authority and role in deciding whether to waive the judiciary's interests "denigrates his constitutional authority and unnecessarily increases the friction between the state and federal governments." (Pet. Brief at 18).

This position is difficult to reconcile with the Attorney General's own insistence in this case that the judiciary's interests be preserved and enforced despite the obvious administrative economy in allowing the court of appeals to determine the merits of a case which seems extremely likely to be ultimately decided in respondent's favor. *See also Crump v. Lane,* No. 86-1286 (7th Cir. 1986) (attached hereto as App. 1).

Accordingly, the exhaustion rule must be enforced in all Section 2254 cases arising out of Illinois which are not subject to exception for futility or exceptional circumstances of peculiar urgency. A federal court should never be bound by even an explicit waiver of exhaustion. Rather, the court should consider the waiver, and any explanation offered for it, only as part of its analysis of whether futility or some extreme circumstances exist to justify exception

to the rule. *See United States ex rel. Trantino v. Hatrack,* 563 F.2d 86, 96-97 (3rd Cir. 1977) (waiver amounts to nothing more than notice that the state is unopposed to the court reaching the merits); *See also Naranjo v. Ricketts,* 696 F.2d 83 (10th Cir. 1982); *Sweet v. Cupp,* 640 F.2d 233 (9th Cir. 1981); *Needel v. Scafati,* 412 F.2d 761 (1st Cir.), *cert. denied,* 396 U.S. 861 (1969).

The interests of the state and federal judiciaries are compelling. They are simply not interests that state prosecutors have been, or should be, empowered to yield. *See Naranjo v. Ricketts, supra,* 696 F.2d 83, 87 (10th Cir. 1982) ("the state court interest in having 'an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights' is simply not an interest that state prosecutors have been empowered to yield").

Indeed, even if a state prosecutor were empowered to explicitly waive the interests of the Illinois judiciary, he could not waive the interests of encouraging state court participation in enforcement of federal constitutional law and its related goals of experimentation and growth in the development of constitutional law and preservation of a national system of courts dedicated to the supremacy of the constitution. *Cf., Braden v. 30th Judicial Circuit Court, supra,* 410 U.S. 484, 490 (1973).

The cases relied on by petitioner as representative of analogous areas of the law are not applicable to this case. *Ohio v. Bureau of Employment Services v. Hodory,* 431 U.S. 471 (1977), which allowed the state to waive similar interests by voluntarily submitting to federal jurisdiction, should not be extended to Section 2254 cases. In *Hodory,* an *amicus* relied on the abstention doctrine of *Railroad Comm's v. Pullman,* 312 U.S. 496 (1941), to urge this Court to remand a case for dismissal, while the state explicitly resisted such a remand in a case involving the con-

stitutionality of a state unemployment compensation law. In the district court the state had argued abstention but the court expressly concluded that the abstention doctrine did not bar the suit. The state then appealed to this Court and abandoned the abstention argument. This Court held that *Hodory* was not a *Pullman*-abstention case, but was controlled by *Younger v. Harris*, 401 U.S. 37 (1971),[2] and then held that although this case was within the purview of *Younger*, that doctrine need not be enforced when the state voluntarily submits to the federal jurisdiction.

Initially, it may be noted that *Hodory* is not inconsistent with the rule urged in this case, in that the exhaustion doctrine is not without some exception, i.e., the "futility" and "special circumstances" principles discussed above. Limiting the exceptions to these two narrow instances, however, even in the face of an explicit waiver, is not inconsistent with *Hodory* in view of the recognition in *Younger* that the considerations underlying that decision are particularly compelling in cases involving state criminal prosecutions. *Younger v. Harris, supra*, 401 U.S. at 43. While not an ongoing prosecution, the underlying issue here goes directly to the scheme for enforcement of state criminal sentences and is equally compelling.

Petitioner's additional cases involving the waiver of personal rights by parties have no bearing on this case where the interests at stake do not belong to the parties. *See, e.g., Clark v. Barnard*, 108 U.S. 436 (1883).

---

[2] *Pullman*-abstention focuses on the possibility that the State may interpret a statute in a manner which may eliminate or materially alter the constitutional question. *Younger*-abstention focuses on the importance of state court participation in the determination of federal constitutional claims." 431 U.S. at 477.

This Court should determine in this case that the nature of the interests underlying the exhaustion requirement are sufficiently compelling and unique to require federal courts to satisfy themselves that either futility or exceptional circumstances justify abandonment of the requirement. While an explicit waiver by counsel for respondent, accompanied by the reasons for the waiver, should be helpful to the court in making its assessment, waiver cannot preclude the court from making its own determination. *See, United States ex rel. Trantino v. Hatrack*, 563 F.2d 86 (1977).

Nonetheless, even if this Court determined that the attorney general could explicitly waive exhaustion, policy considerations dictate against inferring forfeiture solely from the failure of respondent's counsel to raise an exhaustion defense in his initial response to the petition.

In a Section 2254 proceeding arising out of Illinois, the attorney general represents specific executive branch clients who are generally either corrections or parole authorities. In cases where the constitutionality of a statute is in issue, as here, he must also protect interests of the legislature. In all Section 2254 actions he must protect interests of the judiciary whether the case relates directly to the integrity of a judicial proceeding or whether the interest is concerned more with the state court's role in interpreting and applying state law and the federal constitution.

Although the state judiciary is not a party to a Section 2254 proceeding, the judiciary is a client of the attorney general. While this relationship is not precisely akin to a traditional attorney-client relationship (*See E.P.A. v. Pollution Control Bd.*, 69 Ill. 2d 394, 401, 372 N.E.2d 50 (1977)), the Attorney General cannot, in accord with his duties and obligations, simply ignore the interests of the judiciary. The importance he places on his duty to the

judiciary is evidenced in the facts of both this case and *Crump v. Lane, supra,* (A-1) where after prevailing on the merits in the district court and while fully expecting to prevail on the merits in the court of appeals, he sought dismissal for exhaustion when it became apparent that the claim remained unexhausted. He did so with the recognition that administrative and even judicial expedience are not special circumstances which can justify scrapping the interests underlying the exhaustion requirement. *Duckworth v. Serrano, supra,* 454 U.S. at 3 (reversing a writ issued despite failure to exhaust where the court of appeals had relied on a "clear violation of rights" and judicial economy in finding that exhaustion was not required).

The Attorney General of Illinois, therefore, in accord with his duties and obligations cannot ignore the judiciary's interests. For this reason, anything but an explicit and explained attempt to waive exhaustion can only be indicative of lack of development of the law, mistake or inadvertence. In this case, the fact that the State did not intend to waive exhaustion is obvious from the fact that the issue was pressed on appeal when respondent's counsel realized that the case was unexhausted.

The petition below was prepared in August, 1983 (J.A. 8). An assistant attorney general moved the magistrate to dismiss the petition for failure to state a claim before filing an Answer pursuant to Rule 5. 28 U.S.C. foll. § 2254, Rule 5. The respondent did not address exhaustion in his motion. While that motion was pending, the United States Court of Appeals for the Seventh Circuit reversed the opinion on which petitioner had based his claim. As a result, the magistrate recommended that the petition be denied and the district court agreed on April 18, 1984 (J.A. 18-21).

Nearly one year later Judge Bua of the United States District Court for the Northern District of Illinois in dismissing a Section 2254 petition *sua sponte* in an unpublished Order, held for the first time that denial of a motion for leave to file a petition for writ of mandamus by the Illinois Supreme Court does not satisfy the exhaustion requirement. *United States ex rel. Carbona v. Huch,* No. 85 C 1750 (March 26, 1985) (A-17).

Respondent then urged a similar argument in his brief before the Circuit Court of Appeals, which was filed on May 10, 1985. The case at bar was the first time that the court of appeals adopted the position previously announced by Judge Bua in *Carbona.*

Even if this Court were willing to accept petitioner's argument that the Attorney General has the power to determine that some other state interest offsets the concerns of comity and, in accord with that determination, to expressly waive the interests of the judiciary, that argument should not be extended to cases where, as here, no such determination was made. The attorney general has made clear that Illinois desires that the exhaustion doctrine be enforced in this case from the earliest indication that there was a failure to exhaust.

Finally, and contrary to petitioner's position, requiring exhaustion in the absence of futility or special circumstances is consistent with *Wainwright v. Sykes,* 433 U.S. 72 (1977) and its progeny, regardless of how or when the failure to exhaust is brought to the attention of, or discovered by, the federal court. The rule of *Wainwright,* like the exhaustion requirement itself, was developed to encourage petitioners to fully litigate their constitutional claims in the state courts. See *Wainwright v. Sykes,* 433 U.S. at 81-83. Similarly, rigid adherence to the exhaustion doctrine promotes the parallel goals of permitting

state courts an equal participatory share in the development of constitutional jurisprudence. If anything, petitioner's efforts to seek application of the *Wainwright* default doctrine to questions of exhaustion are contrary to the underlying principles of comity and federalism inherent in both the procedural default doctrine and the exhaustion doctrine.

Respondent urges this Court to hold that a federal court on Section 2254 review should refuse to consider any unexhausted petition not subject to exception for futility or special circumstances, regardless of how or when the failure to exhaust comes to the court's attention.

II.

THE PETITIONER HAS NOT EXHAUSTED HIS AVAILABLE STATE COURT REMEDIES.

A.

A Motion For Leave To File A Petition For Writ Of Mandamus In The Illinois Supreme Court Does Not Satisfy The Exhaustion Requirement.

Petitioner contends that he exhausted his available state court remedies by filing a motion for leave to file a petition for writ of *mandamus* in the Illinois Supreme Court. Petitioner's argument is wholly without support in either federal or Illinois caselaw. The Illinois Supreme Court's denial of petitioner's motion for leave to file a petition for writ of mandamus clearly did not amount to an adjudication on the merits of his claim.

Original jurisdiction *mandamus* in the Illinois Supreme Court is authorized by the Illinois Constitution, Ill. Const. Art. 6, § 4(a), and procedurally governed by Supreme Court Rule 381. 87 Ill. 2d, at 420 (1981); Ill. Rev. Stat. 1985, ch. 110A, ¶ 381.

The Illinois Supreme Court's discretionary jurisdiction in mandamus is normally exercised only where no ordinary remedy is available or adequate. *Hughes v. Kiley*, 67 Ill. 2d 261, 266, 367 N.E.2d 700, 702 (1977); *See also, People ex rel. Carey v. Covelli*, 61 Ill. 2d 394, 400, 396 N.E.2d 759 (1975) (writ entertained where the issue is "novel" and appears "to be of considerable importance to the administration of justice"); *People v. Lueders*, 287 Ill. 107, 112, 122 N.E. 374 (1919) (the exercise of mandamus jurisdiction "by this court is discretionary, and the court will assume jurisdiction in cases only where there is a special reason and the remedy in the trial court is ineffective. . .").

Contrary to petitioner's suggestion, the Illinois Supreme Court's refusal to exercise this extraordinary jurisdiction is not an adjudication on the merits and does not preclude seeking relief in the circuit court and eventually perfecting an appeal to the Illinois Supreme Court. *Monroe v. Collins*, 393 Ill. 553, 556-557, 66 N.E.2d 670, 672 (1946); *See also Torjesen v. Smith*, 114 Ill. App. 3d 147, 448 N.E.2d 273 (5th Dist. 1983), *appeal dismissed*, 465 U.S. 1015.

The denial of leave to file a petition for writ of mandamus in the Illinois Supreme Court is, therefore, not an adjudication on the merits and it is not a refusal by the state judiciary to consider a claim.

The decisions of this Court make it clear that a state supreme court's denial of a petition for an extraordinary writ does not satisfy the exhaustion requirement where the denial does not constitute an adjudication on the merits. *See Pitchess v. Davis*, 421 U.S. 482, 488 (1975); *Ex Parte Hawk*, 321 U.S. 114, 116 (1944). *Pitchess* relies on this Court's teaching in *Picard v. Connor*, 404 U.S. 270, 275-276 (1971), that exhaustion of state court remedies re-

quires that claims be exhausted by fair presentation to the state courts and not merely by passage through the state courts. *Pitchess, supra,* 421 U.S. at 487.

B.

Petitioner Should Not Be Heard To Argue The Futility Of Taking His Claim To State Court Where The Same Showing Is Required There As In Federal Court.

Invoking the "futility" exception to the exhaustion rule discussed in *Duckworth v. Serrano, supra,* 454 U.S. 1, 4 (1981), petitioner argues that relief on his *ex post facto* claim is precluded in Illinois because of the decision in *Harris v. Irving,* 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980). In *Harris,* the court rejected an *ex post facto* argument virtually identical to that raised by petitioner.

At the outset, petitioner does not address the exhaustion of his due process claim. That claim is clearly cognizable in an Illinois mandamus proceeding. *See United States ex rel. Johnson v. McGinnis,* 734 F.2d 1193 (7th Cir. 1984). As a result, even if his *ex post facto* claim is within the "futility" exception, the failure to exhaust the due process claim requires dismissal of the entire petition. *Rose v. Lundy,* 455 U.S. 509 (1982). Nonetheless, petitioner's futility argument should be rejected.

As discussed above, the "futility exception" is a term which has been used to describe two slightly different concepts. The narrower view of "futility" is applied in cases where the highest state court has recently addressed the issue and decided it adversely to petitioner in the absence of any intervening decision of this Court or any other indication that the state court is likely to change its position. *See Sweet v. Cupp,* 640 F.2d 233, 236 (9th Cir. 1981) (discussing the futility exception and its purpose).

While the Illinois Supreme Court did deny discretionary leave to appeal in *Harris* pursuant to Illinois Supreme Court Rule 315 (104 Ill. 2d at XXV, Ill. Rev. Stat. 1985, ch. 110A, ¶ 315), that court has never entertained the merits of a claim similar to that raised by petitioner in this action. *See People v. Vance,* 76 Ill. 2d 171, 183, 390 N.E.2d 867, 872 (1979) (denial of a petition for leave to appeal carries no connotation of approval or disapproval of the appellate court's action).

Thus, while it is true that the only appellate court to have addressed the issue did reject it, the highest state court has not considered this issue on the merits. As a result, this futility exception is not applicable to this case.

The broader test of futility expressed in *Duckworth v. Serrano, supra,* 454 U.S. 1, 3 (1981), explains that the exception is made "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."

This exception also does not apply to this case. An available avenue for relief clearly exists through a petition for writ of mandamus in circuit court and the claim is not precluded by any ruling of the state supreme court. Since mandamus is an appropriate vehicle for considering statutory constitutionality (*See People ex rel. Scott v. Kerner,* 32 Ill. 2d 539, 208 N.E.2d 561 (1965)), the remedy would be identical to that available to petitioner if he could prevail under Section 2254.

Under either approach to futility, therefore, the exception has no application in this case.

Moreover, even if the exception were applicable, the peculiar circumstances attendant to this case militate against the application of the futility exception.

In *Harris* the Appellate Court of Illinois rejected the *ex post facto* argument advanced by petitioner. In *Welsh v. Mizell*, 668 F.2d 328 (7th Cir.), *cert. denied*, 459 U.S. 923 (1982), the court mentioned and rejected *Harris*, in holding that the 1973 revisions to Ill. Rev. Stat. ch. 38, ¶ 1003-3-5(c), violated the *Ex Post Facto* Clause (U.S. Const. art. 1, § 10, cl. 1) when applied to inmates sentenced for crimes committed prior to the adoption of that section.

Two years later, in *Heirens v. Mizell*, 729 F.2d 449, 459 (7th Cir.), *cert. denied*, 469 U.S. 842 (1984), the court explicitly reversed the *ex post facto* holding of *Welsh*, placing the state and federal courts in agreement on the question.

Having been rejected by the middle level appellate courts of both jurisdictions petitioner's claim is equally "futile" in federal and state court. In this Court, petitioner "strongly contends" that the decision in *Heirens* is incorrect and that he believes that he can demonstrate that the statute is an *ex post facto* law "as applied to him." Pet. Brief at 22, fn. 2. If petitioner does indeed have a convincing *ex post facto* argument, that argument should be as convincing in the Appellate Court of Illinois, Fifth District, as it could be in the United States Court of Appeals for the Seventh Circuit. It is well-settled that state courts of original jurisdiction are both competent to decide federal constitutional questions and are under an "obligation to render such decision as will give full effect to the supreme law of the land and protect any right secured by it to the accused [which] is the same that rests upon the courts of the United States." *New York v. Eno*, 155 U.S. 89, 98 (1894); See also *Ex Parte Royall*, 117 U.S. 241, 251 (1886). (State courts are "equally bound to guard and protect rights secured by the Constitution.")

Allowing the state court to consider the claim in the first instance avoids requiring a federal court to interpret and apply a state procedural statute and its related administrative rules with regard to a specific constitutional claim without the benefit of the guidance of a state court. Moreover, failure to allow the state court to review the issue before it is taken to a federal forum deprives Illinois of the first opportunity to correct its own problems. *See United States ex rel. Sostre v. Festa*, 513 F.2d 1313, 1319 (2d Cir.) (Feinberg, J., concurring), *cert. denied*, 423 U.S. 841 (1975) (state should be allowed the opportunity to keep its own house in order). Whatever petitioner's convincing new argument may be, it must first be presented to the courts of Illinois.

The available state remedy in this case is capable of providing petitioner a hearing on his claim which would be as full and fair as a Section 2254 proceeding and which would be equally adequate in that it can provide the same relief that petitioner could obtain in federal court if he can prevail. In both forums petitioner will be required to direct an argument to an Illinois statute which is sufficient to overcome adverse precedent in both jurisdictions. If petitioner's argument is futile, it is futile in both courts. Conversely, if it is strong, it is equally strong in both courts which are equally bound to uphold and enforce the Constitution.

Because it is an Illinois statute and Illinois procedures which are implicated by petitioner's claim, the courts of Illinois must have the first opportunity to consider his new or additional argument. *Serrano, supra.*

CONCLUSION

The state did not forfeit the defense of non-exhaustion of state court remedies by failing to raise that issue in the district court. Petitioner has not exhausted his available state court remedies.

For the reasons stated herein, respondent respectfully prays that the judgment of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA J. STEWART
Solicitor General, State of Illinois
MARK L. ROTERT *
TERENCE M. MADSEN
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Attorneys for Respondent

* Counsel of Record

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1286

PAUL O. CRUMP,

Petitioner-Appellant,

v.

MICHAEL P. LANE, Director, Illinois Department of Corrections, et al.,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 7043—**Paul E. Plunkett**, *Judge.*

ARGUED OCTOBER 20, 1986—DECIDED DECEMBER 19, 1986

Before BAUER, *Chief Judge,* CUMMINGS and EASTERBROOK, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This action challenges a series of decisions by the Illinois Prisoner Review Board ("the Board") denying plaintiff's release on parole on eight separate occasions between February 1977 and April 1984. Plaintiff seeks both money damages and declaratory relief under 42 U.S.C. § 1983 and a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On March 19, 1953, plaintiff Paul Crump was convicted of killing an unarmed security guard during a robbery. Crump was sentenced to death for the murder. In 1955

the Illinois Supreme Court reversed Crump's conviction and remanded the case for a new trial. Crump was retried and again convicted of murder and sentenced to death. On August 1, 1962, his sentence of death was commuted to a term of "199 years, without parole." In 1976 the "without parole" provision was stricken from the previous commutation order. Between February 1977 and April 1984, Crump has been considered for parole by the Board eight times, and the Board has denied parole each time.

Plaintiff filed the present action in federal district court on November 17, 1982. Plaintiff twice amended his complaint to add challenges based on the 1983 and 1984 denials of parole. After a full evidentiary hearing, the district court denied Crump's petition for a writ of habeas corpus and entered judgment in favor of the defendants on all other claims. It is from these judgments that plaintiff appeals.

I.

The defendants assert that this Court is precluded from reviewing the merits of plaintiff's claims because he has failed to exhaust his available state court remedies as required by 28 U.S.C. § 2254(b). They contend that plaintiff must seek a writ of mandamus in an Illinois circuit court before the exhaustion requirement may be deemed satisfied.

This is not the first time that the exhaustion requirement has been at issue in this case. On December 18, 1984, the district court dismissed the habeas portion of plaintiff's complaint for failure to exhaust his state remedies for denial of parole because he had failed to seek a writ of mandamus in the Illinois courts in accordance with this Court's decision in *United States* ex rel. *Johnson v. McGinnis*, 734 F.2d 1193 (7th Cir. 1984). Plaintiff then proceeded to file a motion for leave to file a petition for an original writ of mandamus with the Illinois Supreme Court, which was denied on June 25, 1985. Finding that plaintiff had exhausted all state remedies, the district court reinstated plaintiff's action on July 30, 1985.

Relying on our decision in *Granberry v. Mizell*, 780 F.2d 14 (7th Cir. 1985), certiorari granted *sub nom. Granberry v. Greer*, 107 S. Ct. 62 (No. 85-6790), defendants argue that plaintiff must seek a writ of mandamus in an appropriate Illinois circuit court. In essence, their position is that the Illinois Supreme Court's denial of the motion for leave to file a petition for a writ of mandamus was not a decision on the merits and thus plaintiff must now seek a writ in circuit court.

Plaintiff attempts to distinguish his case from the factual situation before this Court in *Granberry*. In *Granberry*, the Illinois Supreme Court denied the petitioner's motion seeking leave to file a petition for a writ of mandamus "without prejudice to proceeding in any appropriate circuit court for consideration of the question presented." 780 F.2d at 16. In contrast, plaintiff argues, the language used by the Illinois Supreme Court in his case was merely "Motion *denied*." (Plaintiff's Reply Br. App. 1). Plaintiff draws a negative inference from the language used by the Illinois Supreme Court in the *Granberry* case to demonstrate that the motion for leave to file in his case was denied with prejudice.

The exhaustion issue here obviously turns on what *res judicata* effect the Illinois courts give to a denial by the Illinois Supreme Court of a motion for leave to file a petition for a writ of mandamus. Plaintiff has provided us with no Illinois caselaw to support his proposition that the denial was a ruling on the merits and accordingly with prejudice. The Illinois Attorney General has cited the case of *People* ex rel. *Yarrow v. Leuders*, 287 Ill. 107, 122 N.E. 374 (1919), as authority for the proposition that the denial was not a ruling on the merits and thus without prejudice. Our reading of the *Leuders* case, however, does not yield the proposition that the Attorney General claims. In *Leuders*, the Illinois Supreme Court held that the exercise of its original jurisdiction in mandamus is discretionary and that it would assume jurisdiction in a mandamus case "where there is a special reason and the remedy in the trial court is ineffective" even though an identical proceeding was pending in a lower court. 287 Ill. at 112, 122 N.E. at 376.

Leuders did not address the question of whether the Illinois Supreme Court's denial of a motion for leave to file a petition for a writ of mandamus would preclude the petitioner from refiling the petition in circuit court.

Our own research has revealed several Illinois cases which hold that the Illinois Supreme Court's denial of a motion for leave to file is without prejudice to refiling in the circuit court. In *Monroe v. Collins*, 393 Ill. 553, 66 N.E.2d 670 (1946), the Illinois Supreme Court held that an order denying leave to file an original action in the Illinois Supreme Court is not an adjudication on the merits and does not preclude the plaintiff from prosecuting an action seeking the same relief in a circuit court and eventually perfecting an appeal to the Illinois Supreme Court. 393 Ill. at 556-557, 66 N.E.2d at 672. The court based its holding on the nature of the motion for leave to file an original action:

> [T]he procedure in making the application and the order of denial does not include the fundamentals of parties and a decision on the merits, which are necessary that a judgment possess before it may be pleaded in bar of a subsequent action. The making of the application and its consideration by this court are *ex parte*. The persons who are to be defendants, if leave to file is granted, are not in court on such application and have no opportunity to resist it. It is clear that if an application for leave to file should be allowed, there would be nothing in the order allowing it that would operate as a bar to the defenses any defendant might interpose.

393 Ill. at 556, 66 N.E.2d at 672.

In reviewing a mandamus case the Appellate Court of Illinois has recently relied on *Monroe v. Collins* to hold that the denial of a motion for leave to file a complaint for mandamus directly with the Illinois Supreme Court does not operate as a bar to a subsequent proceeding in an Illinois circuit court based on the same complaint. *Torjesen v. Smith*, 114 Ill. App. 3d 147, 150, 448 N.E.2d 273,

275 (5th Dist. 1983), appeal dismissed, 465 U.S. 1015. Therefore when the Illinois Supreme Court denied Crump's motion for leave to file a petition for a writ of mandamus, it was without prejudice to his refiling the petition in circuit court. Moreover, as *Monroe* and *Torjesen* illustrate, if the circuit court were to deny Crump's petition for mandamus, he would then be free to seek review in the Illinois appellate courts.

Crump maintains that he did file a petition for a writ of mandamus in an Illinois circuit court in 1974. *People* ex rel. *Crump v. Brantley*, 17 Ill. App. 3d 318, 307 N.E. 2d 651 (1st Dist. 1974), certiorari denied, 419 U.S. 1111. However, because only the most recent parole denial in 1984 is the proper subject of Crump's habeas corpus petition, since it is pursuant to this latest determination that Crump remains in custody, *United States* ex rel. *King v. McGinnis*, 558 F. Supp. 1343, 1345 n.1 (N.D. Ill. 1983), it is obviously impossible for Crump to have raised his claims surrounding the 1984 denial in a petition for mandamus filed in 1974.

Crump makes a more serious argument when he complains that the Illinois Attorney General waived the exhaustion issue in the district court. Indeed, when the district court reinstated Crump's second amended complaint on July 30, 1985, the Attorney General apparently conceded that Crump had fully exhausted his state remedies. In his memorandum opinion below, Judge Plunkett acknowledged this fact when he wrote, "Both sides agree that Crump has exhausted all state court remedies, a prerequisite to this court's consideration of a petition for a writ of habeas corpus." *Crump v. Lane*, No. 82 C 7043, slip op. at 2 (N.D. Ill. Oct. 29, 1985).

The Attorney General now argues that the defendants did not waive the exhaustion issue but merely erred in failing to press it before the district court. Before our decision in *Granberry*, he contends, there was insufficient support in the law for the defendants to have insisted that the district court should dismiss plaintiff's habeas petition for failure to exhaust and instruct him to file a peti-

tion for a writ of mandamus in the proper Illinois circuit court.

The waiver question presented here is similar to that before this Court in *United States* ex rel. *Lockett v. Illinois Parole & Pardon Bd.*, 600 F.2d 116 (7th Cir. 1979). In *Lockett*, the state had failed to raise the exhaustion issue in the district court and in the briefs on appeal. Between the time that the *Lockett* briefs were filed and the oral argument on appeal, this Court handed down a decision which suggested that the petitioner had not exhausted all available state court remedies.[1] Consequently, the state urged the exhaustion issue at the *Lockett* argument for the first time. Acknowledging that the Circuits were divided as to whether the state could waive the exhaustion requirement, we concluded that the exhaustion issue had not been waived by the state in *Lockett* because the state had made no explicit waiver and had orally raised exhaustion before us on appeal. 600 F.2d at 118. Moreover, we concluded that there was no bar to raising the exhaustion issue on our own. *Id.* See *Mattes v. Gagnon*, 700 F.2d 1096, 1098 n.1 (7th Cir. 1983) (court must consider whether petitioner succeeded in exhausting his state remedies as required by § 2254(b), "although the parties do not raise the question").

To be sure, this Circuit has not spoken with one voice on whether the exhaustion requirement may be waived by the state. In *Heirens v. Mizell*, 729 F.2d 449, 457 (7th Cir. 1984), certiorari denied, 469 U.S. 842, the Court in dicta suggested that the exhaustion issue may be waived if the state fails to raise the issue in the proceeding before the district court. The cases cited as authority in *Heirens*, however, did not involve the exhaustion requirement, but merely expressed the general rule that a party on appeal may not raise arguments that were not first presented to the district court. More importantly, in *Granberry*, we

[1] *United States* ex rel. *Williams v. Morris*, 594 F.2d 614 (7th Cir. 1979).

expressly rejected *Heirens* to the extent that it could be read "as suggesting that the exhaustion requirement may be waived by the failure to assert it in the district court." 780 F.2d at 15. The Illinois Attorney General in *Granberry* asserted the exhaustion requirement for the first time on appeal, but we nonetheless concluded that the state had not waived exhaustion and remanded the case to the district court with instructions to dismiss for failure to exhaust state remedies.

Although it was seemingly suggested in dicta in *Granberry* that even an explicit waiver by the state of the exhaustion requirement would be ineffectual, 780 F.2d 15-16, this Circuit has never adopted such a far-reaching rule.[2] In *United States* ex rel. *Russo v. Attorney General of Illinois*, 780 F.2d 712, 714 n.1 (7th Cir. 1986), certiorari denied, 106 S. Ct. 2922, we declined to order *sua sponte* dismissal for failure to exhaust because the state had failed to raise the exhaustion issue both in the district court and on appeal. Similarly, in *Mosley v. Moran*, 798 F.2d 182, 184 (7th Cir. 1986), we held that this Court need not

[2] Two recent Seventh Circuit cases have suggested, while expressly declining to hold, that the state may not waive the defense of exhaustion of state remedies. *Barrera v. Young*, 794 F.2d 1264, 1267-1268, 1269 n.* (7th Cir. 1986); *Walberg v. Israel*, 766 F.2d 1071, 1072 (7th Cir. 1985), certiorari denied, 106 S. Ct. 546. These cases note that the statutory basis of the exhaustion doctrine, § 2254(b), is phrased in mandatory terms. If the satisfaction of § 2254(b) is construed to be a precondition to a federal court's exercising jurisdiction over a habeas corpus action, even an explicit waiver by the state of the exhaustion requirement would not authorize the federal court to reach the merits of the petitioner's claim. In *Walberg*, the court also noted that considerations of comity and federalism should make a federal court determine on its own initiative whether the petitioner has exhausted his state remedies because the state attorney general may not be representing the interests of the state as a collective. *Sua sponte* consideration of the exhaustion requirement by the court of appeals may be necessary if the attorney general is "less zealous in protecting the prerogatives of the state than he ought to be." 766 F.2d at 1072.

always reach the exhaustion issue *sua sponte* when the state has failed to press it on appeal and special circumstances counsel against dismissing the action for failure to exhaust. In *Mosley*, the state had argued exhaustion in the district court but chose not to raise it on appeal. While deciding not to reach the exhaustion issue, we emphasized that "a federal court should reach nonexhausted habeas claims only 'in those rare instances where justice so requires.' " 798 F.2d at 184 (quoting *United States* ex rel. *Trantino v. Hatrack*, 563 F.2d 86, 95 (3d Cir. 1977), certiorari denied, 435 U.S. 928). These cases obviously differ from the one now before us in that the Illinois Attorney General is urgently pressing the exhaustion issue here on appeal.

As indicated above, the Supreme Court on October 6, 1986, granted certiorari in *Granberry*. 107 S. Ct. 62. One of the questions to be presented to the Supreme Court is "Does state's failure to raise issue of non-exhaustion of state court remedies in district court foreclose consideration of that issue on appeal in federal habeas corpus petition brought by state prisoner under 28 U.S.C. § 2254?" 55 U.S.L.W. 3267 (U.S. Oct. 14, 1986). The Court's answer should resolve the uncertainty within our Circuit over the waiver problem, not to mention the division within the Circuits, see *Granberry*, 780 F.2d at 15 (discussing cases from different Circuits). Until the Supreme Court renders its decision, the controlling law in this Circuit is that the state will not be deemed to have waived the exhaustion requirement as long as it presses the issue on appeal.

Moreover, there is an important distinction between this case and *Granberry*. Although the opinion there is silent, it appears that the state's failure to raise the exhaustion issue in the district court in *Granberry* was the result of mere carelessness by the Attorney General. See also *Barrera v. Young*, 794 F.2d 1264, 1267 (7th Cir. 1986) (posing the question as "whether exhaustion of remedies may be waived by oversight"). In this case, like the *Lockett* situation, the state did not argue exhaustion before the district court because until we issued our opinion in *Granberry*, the Attorney General did not believe that he had sufficient support to advance the proposition that a habeas petitioner challenging a parole denial must seek a writ of mandamus in a circuit court in order to satisfy the exhaustion requirement of § 2254(b), even though the Illinois Supreme Court may have previously denied a motion for leave to file an original petition for a writ of mandamus. That the Attorney General was generally concerned with the exhaustion requirement is evidenced by the fact that he was successful in convincing the district court to dismiss Crump's habeas petition in 1984 for failure to exhaust on the ground that he had failed to seek a writ of mandamus in any Illinois court. We therefore conclude that the defendants here have not waived the defense of failure to exhaust state remedies.

As the Attorney General argues, dismissal for failure to exhaust state remedies is particularly appropriate here because the Illinois courts have apparently not yet had an opportunity to interpret the particular provision of the Illinois parole statute under which Crump's due process claims arise. Ill. Rev. Stat. ch. 38, ¶ 1003-3-5(c)(1).[3] This fact takes on special importance in light of the larger question of whether the parole statute creates the sort of "liberty or property" interest entitled to constitutional protection. In *Scott v. Illinois Parole & Pardon Bd.*, 669 F.2d 1185 (7th Cir. 1982) (*per curiam*), certiorari denied, 459 U.S. 1048, this Court held that the Illinois parole statute does create a legitimate expectation of release on parole and thus gives rise to a constitutionally protected liberty interest. The Court noted, however, that the Illinois courts had never interpreted the scope of the interest, if any, which the statute was intended to afford Illinois state prisoners, 669 F.2d at 1189 and n.4, and the decision was

[3] Subsection (c)(1) provides:

> The Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; . . . .

based on a prediction about the course of decision in the Illinois state courts. The Illinois courts have yet to construe the Illinois parole statute in light of our decision in *Scott*.[4] Moreover, in *Huggins v. Isenbarger*, 798 F.2d 203 (7th Cir. 1986), this Court held that the Indiana parole statute, similar in most respects to the Illinois statute, did not create a constitutionally protected interest, again on the basis of a prediction about what the Indiana state courts will do. This confusion has led the Supreme Court to grant certiorari in *Allen v. Board of Pardons*, 792 F.2d 1404 (9th Cir. 1986), certiorari granted, 55 U.S.L.W. 3335 (No. 86-461, Nov. 10, 1986), which followed the approach taken in *Scott*, to determine whether the Montana parole statute creates a constitutionally protected "liberty interest entitlement in parole release." The uncertainty surrounding the construction of state parole statutes makes it all the more important to allow the Illinois courts an opportunity to state their view of the meaning of the Illinois parole statute.

We appreciate that the district court has already held a full evidentiary hearing on the merits of Crump's claims.

[4] In *People* ex rel. *Burbank v. Irving*, 108 Ill. App. 3d 697, 439 N.E.2d 554 (3d Dist. 1982), the Appellate Court of Illinois ruled that the Illinois Habeas Corpus Act does not provide relief to a prisoner whose request for parole has been unreasonably, arbitrarily or capriciously denied. In so doing, the court noted that in Illinois the mere existence of a parole system does not transform parole into a legal right and that the decision to modify a prisoner's status from incarceration to parole lies within the largely unreviewable discretion of the Prisoner Review Board. 108 Ill. App. 3d at 702, 439 N.E.2d at 557. Although this decision would tend to suggest that our prediction in *Scott* may not have been correct, we do not find it conclusive because the court was construing the Habeas Corpus Act, not the parole statute. See *Heirens v. Mizell*, 729 F.2d 449, 465-466 n.18 (7th Cir. 1984) (refusing to reconsider *Scott* in light of *Burbank* because it did not directly address whether the Illinois parole statute creates an expectation of parole requiring protection under due process). Furthermore, because it was released shortly after our decision in *Scott*, the decision did not take note of *Scott*.

Unfortunately, this fact in itself does not allow us to circumvent the exhaustion requirement of § 2254(b). It should, however, substantially obviate the need for further fact-finding if Crump chooses to reinstate his action in the district court upon exhausting all available state court remedies.

For the reasons set out above, we remand plaintiff's action to the district court with instructions to dismiss for failure to exhaust state remedies.

II.

Ordinarily our holding that plaintiff failed to exhaust his state remedies would end our consideration of the case on appeal. In addition to his habeas corpus petition, however, Crump has also brought a § 1983 action seeking damages and a declaratory judgment that he is being illegally confined in violation of the United States Constitution. Unlike federal habeas claims, § 1983 actions are not subject to the requirement that the plaintiff must first exhaust all available state court remedies. In *Wolff v. McDonnell*, 418 U.S. 539, the Supreme Court explored the interrelationship between 28 U.S.C. § 2254 and 42 U.S.C. § 1983 in actions brought by prisoners. The Court recognized that in *Preiser v. Rodriguez*, 411 U.S. 475, it had previously held that a writ of habeas corpus is the sole federal remedy for state prisoners challenging the very fact or duration of their confinement and seeking a speedier release. The Court in *Preiser*, however, had also held that "habeas corpus is not an appropriate or available federal remedy" for damages claims, 411 U.S. at 494, and that damages claims could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody. *Id.* at 498-499.

The *Wolff* Court affirmed the holding in *Preiser* and further clarified the distinction between habeas relief and § 1983 actions. While emphasizing that prisoners seeking actual release must first exhaust their available state court remedies, the Court indicated that claims properly brought

under § 1983 may go forward in federal court at the same time. 418 U.S. at 554. Claims properly brought under § 1983 include those seeking damages, a declaratory judgment as a predicate to a damages award, or an injunction against future misconduct. *Id.* at 554-555.[5]

In *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986) (*per curiam*), this Court recently held that a prisoner may not maintain a § 1983 action until he has exhausted all available state remedies if a decision on the civil rights claim would be tantamount to a decision on his entitlement to an immediate or more speedy release. Plaintiff Hanson's § 1983 action alleged that he was arbitrarily denied meritorious good-time credits against his sentence in violation of his constitutional rights under the due process and equal protection clauses. Hanson requested that the district court enter a declaratory judgment and award damages for the alleged deprivation of good-time credits, but he did not request the award or restoration of any credits. Hanson, however, had pending in the Illinois state courts a habeas corpus action raising the identical claims advanced in the § 1983 action. This Court concluded that Hanson raised issues which were properly the basis for a habeas corpus action and therefore held that he could not proceed without first exhausting his state court remedies.

[5] The sole federal remedy for a prisoner who seeks release because of a constitutional defect in his conviction is habeas corpus, even if he seeks damages stemming from his alleged unlawful conviction. See, *e.g.*, *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir. 1985) (*per curiam*); *Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir. 1981); *Parkhurst v. Wyoming*, 641 F.2d 775, 777 (10th Cir. 1981) (*per curiam*); *Williams v. Ward*, 556 F.2d 1143, 1150 (2d Cir. 1977). These decisions are motivated not as much by the considerations laid out by the Supreme Court in *Preiser* as by the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, which bars federal court interference with on-going state criminal proceedings. In these cases, without a requirement that the prisoner first exhaust all available state court remedies, the federal court's resolution of the prisoner's claim for money damages would involve a determination of the validity of a state court conviction simultaneously under review in the state appellate courts.

On its face, this broad holding would appear to conflict with the Supreme Court's decision in *Wolff*. That case involved a § 1983 class action brought by state prisoners challenging on due process grounds the disciplinary procedures used to award good-time credits against their sentences. Following *Preiser*, the Court held that the prisoners were required to seek restoration of good-time credit, which would of course affect their release date, in a habeas corpus proceeding after first exhausting state remedies. It also held, however, that short of ordering the actual restoration of good time already cancelled, the district court could review the allegedly unconstitutional procedures in a § 1983 action and could grant damages, or a declaratory judgment as a predicate to an award of damages, and injunctive relief with regard to future proceedings involving good-time rights. 418 U.S. at 554-555.

Other circuits which have adopted approaches consistent with our result in *Hanson* have attempted to distinguish *Wolff* from those cases in which the § 1983 action raises no issue other than the fact or length of a particular prisoner's confinement. In *Alexander v. Ware*, 714 F.2d 416, 418-419 (5th Cir. 1983), the Fifth Circuit held that where a prisoner challenges a single, isolated constitutional violation resulting in his illegal confinement, he is in essence attacking the fact and duration of his custody and must first resort to habeas and exhaust state remedies. If, however, the prisoner mounts a broad, systematic due process challenge to a prison disciplinary system, or a procedure or policy employed therein, he is in essence challenging the conditions of his confinement, even though the challenged practice may also affect the fact or length of his own confinement, and may pursue a remedy under § 1983.

The Fourth Circuit, in *Todd v. Baskerville*, 712 F.2d 70, 72-73 (4th Cir. 1983), explained that a § 1983 action may be maintained without exhaustion of state remedies when the prisoner's claim (1) alleges a constitutional due process violation relating to prison procedures that do not affect the length or duration of his sentence as then existing, or (2) seeks damages because of mistreatment vio-

lative of constitutional rights and relating strictly to the conditions of his confinement and not its fact or duration. If, however, the core of the prisoner's claim is the length or duration of his sentence and "any claim of damages is purely ancillary to and dependent on a favorable resolution of the length or duration of his sentence," the proceedings must first be in habeas and are subject to exhaustion. 712 F.2d at 73.

It would appear that under certain circumstances at least, a prisoner may pursue a § 1983 action in federal court without first exhausting his state court remedies even though, as in *Wolff*, the claims raised in the § 1983 action are virtually identical to those raised in a habeas corpus proceeding.[6] We need not precisely define those circumstances now because the facts of the instant case are virtually identical to those in *Hanson*.[7] Crump's § 1983

[6] If the prisoner were successful in his § 1983 action, he would be entitled to damages and whatever injunctive relief would be appropriate within the limitations set out in *Wolff*. He would not, of course, be entitled to release. As the Supreme Court noted in *Wolff* at 418 U.S. 554 n.12, however, the adjudication of the federal § 1983 claim may through *res judicata* determine the outcome of the state proceedings in which the prisoner is seeking release.

[7] The difficulty in differentiating between which prisoner petitions are properly brought as § 1983 actions and which are properly brought as habeas corpus actions is further illustrated by the fact that this Circuit allows prisoners to challenge parole denials in § 1983 actions as long as they do not assert a right to be released on parole, but seek only a statement of reasons for the denial or an injunction requiring a rehearing by the Board in accordance with due process. See *Huggins v. Isenbarger*, 798 F.2d 203, 204 (7th Cir. 1986); *Walker v. Prisoner Review Bd.*, 694 F.2d 499, 501 (7th Cir. 1982). Although the relief sought in the § 1983 action might improve the prisoner's chance of parole, these cases maintain that the question of release would still remain within the discretion of the parole board. The holding of these cases has been criticized on the ground that although the complaint may not formally pray for release, the prisoner is actually seeking, sooner or later, just that. *Huggins*, 798 F.2d at 207 (Easterbrook, J., concurring).

action does not challenge the constitutionality of the procedures or the statutory provisions and regulations used by the Illinois Prisoner Review Board in making their decisions. Rather, Crump merely alleges that the Board's repeated decisions to deny him parole violated his constitutional rights to due process and equal protection because they were arbitrary and capricious and based on grounds which were unsupported by the evidence and impermissible under the terms of the Illinois parole statute.

Were we to entertain Crump's § 1983 action and find that the Board's decisions indeed violated his constitutional rights, it would be tantamount to deciding that Crump is being illegally confined in violation of the United States Constitution. In his dissent in *Preiser*, even Justice Brennan acknowledged that where a prisoner's selection of an alternative remedy to habeas corpus undermines and effectively nullifies the habeas exhaustion requirement, the suit should be viewed as "an impermissible attempt to circumvent that requirement." 411 U.S. at 524 n.14. The core of Crump's claim concerns the fact or duration of his confinement, and any award of damages would be entirely dependent upon the favorable resolution of that issue. Before Crump may properly maintain a § 1983 action for damages arising out of his allegedly illegal confinement, he must first exhaust his state court remedies as required by 28 U.S.C. § 2254(b).[8] The judgment of the district court finding in favor of the defendants on the § 1983 claims is vacated.

[8] As we pointed out in *Hanson*, 791 F.2d at 97 and n.8, Crump's right to seek relief under § 1983 will not be prejudiced by the running of the relevant statute of limitations, Ill. Rev. Stat. ch. 110, ¶ 13-202. See *Wilson v. Garcia*, 471 U.S. 261 (appropriate state statute of limitations that federal court must borrow in § 1983 suit is the statute of limitations for personal injury suits). Ill. Rev. Stat. ch. 110, ¶ 13-211 specifically tolls the statute for persons imprisoned on a criminal charge until 2 years after their release. See *Bailey v. Faulkner*, 765 F.2d 102, 104 (7th Cir. 1985) (when federal court borrows a state statute of limitations, it borrows any applicable tolling provisions as well).

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. RUTHE MARIE CARBONA,
Plaintiff,

No. 85 C 1750 v.

JANE E. HUCH, et al.,
Defendants.

Honorable Nicholas J. Bua, Presiding

ORDER

Petitioner brings this habeas corpus petition pursuant to 28 U.S.C. §2254 to challenge the constitutional adequacy of reasons given her for denying her parole request. In *United States ex rel. Johnson v. McGinnis*, 734 F.2d 1193 (7th Cir. 1984), the Seventh Circuit held that Illinois provides a judicial remedy for such a claim by way of mandamus. Petitioner in the instant case filed a motion for leave to file a petition for writ of mandamus in the Illinois Supreme Court. On October 1, 1984, that court summarily denied petitioner's motion.

To exhaust state remedies under 28 U.S.C §2254(b), a state prisoner must give the state courts a fair opportunity to address the claimed violations of her federal constitutional rights. *Toney v. Franzen*, 687 F.2d 1016, 1021 (7th Cir. 1982). Generally, the prisoner must follow the normal appellate or post-conviction procedural routes for pursuing her claim through the state courts. *Carter v.*

Estelle, 677 F.2d 427, 443 (5th Cir. 1982), *cert. denied*, 460 U.S. 1056 (1983). Thus, a state supreme court's denial of a petition for an extraordinary writ does not satisfy the exhaustion requirement where denial did not constitute an adjudication on the merits of the issues presented, and where other more appropriate state remedies are available. *Pitchess v. Davis*, 421 U.S. 482, 488 (1975).

The Illinois Supreme Court's summary denial of petitioner's motion for leave to file her petition for a writ of mandamus clearly did not amount to an adjudication on the merits of her claim. Although Ill. Rev. State. ch. 110A, §381 (1983), authorizes original jurisdiction mandamus in the Illinois Supreme Court, the terms of §381 and relevant case law indicate that it is a highly extraordinary remedy available under limited conditions and awarded rarely. *See Hughes v. Kiley*, 67 Ill.2d 261, 266, 367 N.E.2d 700, 702 (1977); *Touhy v. State Bd. of Elections*, 62 Ill.2d 303, 312, 342 N.E.2d 364, 369 (1976).

In *United States ex rel. Milone v. Greer*, 581 F.Supp. 1251 (N.D. Ill. 1984), this court denied habeas relief where the prisoner had not exhausted Illinois mandamus to contest the denial of parole. The Court's decision rested, in part, on *Sharp v. Klincar*, No. 83 MR 65 (Ill. Jud. Cir. Dec. 5, 1983), where a state circuit court ruled upon the merits of an inmate's constitutional challenge to parole denial. Because petitioner in the present case has not sought mandamus at the circuit court level, we find that she had not exhausted available state court remedies.

Accordingly, petitioner's motion for leave to file in forma pauperis is granted. Because petitioner has failed to exhaust state remedies, however, the habeas corpus petition is dismissed without prejudice. *See Rose v. Lundy*, 455 U.S. 509 (1982). Petitioner's motions for appointment of counsel and for summary judgment are denied as moot.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
Judge, United States District Court

Dated: March 26, 1985

No. 85-6790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALDO GRANBERRY,

Petitioner,

v.

JIM GREER, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

HOWARD B. EISENBERG
(Appointed by this Court)
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901
(618) 536-4423
Attorney for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I

THE ONLY ISSUE RAISED IN THIS CASE IS THE EX POST FACTO APPLICATION OF THE ILLINOIS STATUTE TO PETITIONER'S CASE.

Respondent contends that the instant petition included a due process claim which was not exhausted in the state courts of Illinois. Thus, it is argued (Respondent's Brief, p. 20) the instant petition at best included both exhausted and unexhausted claims and should have been dismissed as a mixed petition under the rule of *Rose* v. *Lundy*, 455 U.S. 509 (1982).

As is clearly seen from a review of the *pro se* Petition for Writ of Habeas Corpus (J.A. 6), the only due process claim raised was that required to incorporate the *ex post facto* issue under the fourteenth amendment to the United States Constitution. Moreover, no separate due process issue was decided by the District Court; raised by Petitioner in the Court of Appeals; decided by the Seventh Circuit; raised in the certiorari petition; nor mentioned in Petitioner's Brief in Chief in this Court. Clearly, had there been an additional due process claim it would surely be considered abandoned at this point. If not, Petitioner now explicitly abandons any claim other than the *ex post facto* issue.

Respondent also argues (Brief, pp. 7, 15) that the constitutionality of a state statute is at issue in this case. This is not an accurate characterization of the question raised in the habeas corpus petition or before this Court. At most, Petitioner contends that the statute is unconstitutional as applied to his case. He certainly advances no attack upon the facial validity of the statute nor the Illinois General Assembly's right to adopt or modify parole release criteria.

The only substantive issue raised in the habeas corpus petition was whether the Illinois statute was an *ex post facto* law as applied to this Petitioner.

II

IT IS INAPPROPRIATE FOR A FEDERAL COURT TO CONSIDER NONEXHAUSTION OF STATE COURT REMEDIES WHEN THAT ISSUE WAS NOT TIMELY RAISED BY THE STATE ATTORNEY GENERAL.

A. Respondent has too Narrowly Construed the Purpose of Exhaustion under Section 2254.

Respondent begins his analysis of the exhaustion question by asserting that there are only two exceptions recognized by this Court to the usual rule that a prisoner must exhaust the available state court remedies before filing a petition under 28 U.S.C. § 2254 (Respondent's Brief, p. 6). The two exceptions identified by Respondent are (1) futility and (2) "exceptional circumstances." Petitioner submits that Respondent's analysis of the decisions of this Court is seriously flawed.

The doctrine of futility stands on a manifestly different footing than the other situations in which this Court has not required exhaustion. The concept of futility is really the application of the explicit exception to the exhaustion requirement specified by Congress in 28 U.S.C. § 2254(b). This section of the statute requires exhaustion of state court remedies unless:

> . . . there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

When a federal court finds that pursuit of a state remedy would be futile, it is really determining that the statutory

exception has been met and that the state corrective process does not provide an effective remedy for the prisoner, *see*, *Snethen* v. *Nix*, 736 F.2d 1241, 1245 (8th Cir. 1984); *Galtieri* v. *Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978). This is quite different than the "exceptional circumstances" situation in which there is an available state court remedy, but the prisoner is relieved of the obligation to pursue such process in state court prior to filing his federal petition.

Respondent reads the decisions of this Court defining those "exceptional circumstances" as being limited to cases of great urgency requiring prompt disposition (Respondent's Brief, p. 7). Petitioner submits that this is not a correct analysis of the issue as originally recognized by this Court in *Ex parte Royall*, 117 U.S. 241 (1886). In *Royall* the Court was faced with a habeas corpus petitioner who sought federal habeas corpus *prior to his state trial*. The lower federal court dismissed for lack of jurisdiction. On appeal, this Court determined that the lower court had jurisdiction to hear the case, but that the federal court was "not bound in every case to exercise such power immediately upon application being made for the writ." The Court further concluded that the lower federal court has the "discretion as to the time and mode in which it will exert the powers conferred upon it," 117 U.S. at 251. This Court affirmed the circuit court, finding no abuse of discretion in denying the writ before trial.

In *Royall* this Court decided that ordinarily federal courts have discretion not to intervene in advance of a state criminal trial, "that discretion, however, to be subordinated to any special circumstances requiring immediate action," 117 U.S. at 253. Thus *Royall* clearly stands for the proposition that the federal courts have the discretion to intervene prior to trial, but that the courts must grant

relief if "special circumstances" are found. Although later cases expanded the concept of exhaustion, the fact remains that federal courts have broad discretion to consider habeas corpus petitions prior to exhaustion of state remedies, Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 Ohio St. L.Rev. 393, 405 (1983) (hereinafter cited as "Yackle"). Here Respondent seeks to convert the discretionary rules regarding exhaustion into rigid restrictions which have the same application and impact as jurisdictional prohibitions. Such an assertion is contrary to the established precedent of this Court.

In *Frisbie* v. *Collins*, 342 U.S. 519 (1952) this Court explicitly rejected the precise contention advanced by Respondent in the case at bar. In *Frisbie* the State of Michigan argued that exhaustion of state court remedies was required in all cases except those of great urgency, *Brief for Petitioner* at 27, *Frisbie* v. *Collins*, 342 U.S. 519 (1952). Justice Black, speaking for the Court, rejected such a narrow view of "special circumstances," finding that such circumstances are to be evaluated on a case by case basis, with the district court granted discretion to determine when exhaustion should not be required:

> Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts, subject to appropriate review by the courts of appeal.
>
> . . . The Court of Appeals did expressly consider the question of exhaustion of state remedies. It found the existence of "special circumstances" which required prompt federal intervention "in this case." It would serve no useful purpose to review those special circumstances in detail. They are peculiar to this case, may never come up again, and a discussion of them could not give precision to the "special circumstances" rule. It is sufficient to say that there are sound arguments to support the Court of Appeals' conclusion that prompt decision of the issues raised was desirable. We accept its findings in this respect. 342 U.S. at 521-522.

Indeed, in *Frisbie* one of the factors which lead to this Court to reach the merits of Collins' claim was that the nonexhaustion issue was not raised in the district court, although it was raised in both the Court of Appeals and Supreme Court, 342 U.S. at 521, n. 6, *see also*, *Collins* v. *Frisbie*, 189 F.2d 464 (6th Cir. 1951).

The decisions of this Court do not support the rigid analysis suggested by Respondent. Rather, the decisions of this Court stand for the proposition that a lower federal court may entertain a state prisoner's petition without requiring exhaustion when the unique circumstances of the case require. Here the district court considered the merits of the petition when the state failed to raise a nonexhaustion claim. These circumstances are sufficient, at the very least, to vest discretion in the district court to consider the merits of the case as an "exceptional circumstance" within the meaning of *Royall*. As Professor Yackle concluded:

> The federal habeas courts should not be concerned with exhaustion if the states' own representatives do not raise and insist upon it. If counsel for the respondent fails to assert an exhaustion argument in a proper and timely fashion, that procedural default warrants the normal sanction—forfeiture of any later opportunity to raise it. If counsel concedes that state court remedies have been exhausted or waives the matter, the federal courts should again be unconcerned. There is no greater justification for raising the exhaustion question sua sponte in habeas than in any other context. *Yackle*, at 442 (footnotes omitted).

B. The State Judicial System has No Interest in Litigation which was Never Filed in State Court.

The second primary contention of Respondent is that the state courts of Illinois have an interest in this litigation which is separate and apart from that of the parties to the law suit (Respondent's Brief, pp. 14-15). This perplexing argument is made even more difficult to comprehend by the Illinois Attorney General's assertion that the "judiciary" is also his client. Respondent argues at page 15 of his Brief that the Illinois Attorney General has an obligation to protect the interests of the Illinois judiciary which apparently transcend his representation of the Warden in this case.

Petitioner knows of no authority to suggest that a state judicial system acquires an interest in litigation never filed in state court. Here Petitioner does not complain about his conviction in state court, but raises an issue relating to parole—a question Respondent argues has never been properly advanced in state court. While Petitioner doubts the validity of such a contention as applied to a 2254 petition which attacks a state court conviction, such a position seems particularly inappropriate when applied to a 2254 case which relates to a matter of parole.

Secondly, if the Illinois Attorney General is, indeed, the attorney for the entire state judiciary, as well as the Warden, it would seem incumbent upon counsel to advise the district court of the state's position in a timely manner and not leave to the federal courts the obligation to divine the state's position. If the Attorney General is the attorney for the judiciary, one would assume that he considered the interest of all of his clients before filing a motion in the district court to dismiss this action for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

Thirdly, the Attorney General did more than simply ignore or forget to raise an exhaustion claim. He explicitly asked the district court to resolve the merits of the case. Nowhere in his Brief does Respondent deny that under the usual rules of federal practice and procedure his 12(b)(6) motion acted as a forfeiture of the exhaustion question.

Finally, Respondent's argument is foreclosed by this Court's decision in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977). Certainly if Respondent's argument here was at all viable, the Court in *Hodory* should have declined to allow the federal courts to consider the case, finding that the state judiciary had an interest not adequately advanced by the Ohio Attorney General. Moreover, unlike the case at bar, *Hodory* involved the facial validity of a state statute which had not been construed by the state courts. Here, the facial validity of a statute is not involved, and the Illinois Appellate Court has already considered, and rejected, the precise issue. Respondent's effort (Respondent's Brief, p. 14) to distinguish *Hodory* is simply inadequate, particularly since no ongoing criminal prosecution is involved here.

The position advanced by Respondent is illogical, impractical, contrary to the usual rules of practice and procedure, and directly in conflict with the decisions of this Court. The state should be found to have forfeited any exhaustion issue in this case.

III

PETITIONER HAS EXHAUSTED STATE COURT REMEDIES, AND, IN ANY EVENT, FURTHER RECOURSE TO THE STATE COURTS OF ILLINOIS WOULD BE FUTILE.

A. Petitioner has Exhausted his State Court Remedies.

Without reference to the specific procedural posture of this case or the manner in which the Illinois appellate

courts have dealt with the *ex post facto* issue, Respondent argues that the Illinois Supreme Court's denials of Petitioner's motions for leave to file a petition for a writ of mandamus does not amount to an adjudication on the merits. Although Petitioner has shown (Brief-in-Chief, p. 29) that the Illinois Supreme Court's decision is presumed to be on the merits, he asserts, that all he is required to do is give the Illinois courts a fair opportunity to consider his claim; there is no requirement that the court address the merits of the issue, *Smith* v. *Digmon*, 434 U.S. 332, 333 (1978).

Unlike *Picard* v. *Connor*, 404 U.S. 270 (1971), here the precise issue was raised in state court. Unlike *Pitchess* v. *Davis*, 421 U.S. 482, 488 (1975), here the correct remedy was pursued. More importantly, this is an issue which can only be decided by the Illinois Supreme Court. As will be made clear in the final section of this Brief, only the state's highest court is in a position to grant Petitioner relief.

It is true that Petitioner could file an action in the Circuit Court of Johnson County, Illinois. That court, however, would be required to deny relief based on the Appellate Court's decision in *Harris* v. *Irving*, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980). The Fifth District of the Appellate Court, for reasons detailed in the final section of this Brief, would follow *Harris* and deny relief. Petitioner would then be left to seek discretionary review in the Illinois Supreme Court.

Respondent's argument in this Court is reminiscent of Justice Rutledge's description of the Illinois post conviction procedure as a "merry-go-round," *Marino* v. *Ragen*, 332 U.S. 561, 570 (1947) (Rutledge, J., concurring). While Illinois has improved its procedures in the past forty years, the position asserted here is essentially that this

prisoner should be required to return to state court and pursue *pro se* a writ of mandamus which will certainly be denied, so that two or three years from now he can file a new federal habeas corpus petition. Whatever the merits of the general assertion of law cited by Respondent, Petitioner has fairly presented his claim to the Illinois courts and should be deemed to have exhausted his state court remedies.

B. It would be Futile to Require Petitioner to Litigate this Issue in State Court.

Respondent concludes his Brief by arguing that since both the Illinois Appellate Court and the United States Court of Appeals have denied relief on the *ex post facto* question "[i]f petitioner does indeed have a convincing *ex post facto* argument, that argument should be as convincing in the Appellate Court of Illinois, Fifth District, as it could be in the United States Court of Appeals for the Seventh District," (Respondent's Brief, p. 22). This contention fails entirely to consider the manner in which the two courts decided the *ex post facto* issue.

In *Harris* v. *Irving*, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980) the Illinois Appellate Court denied relief finding that a statute which only modified parole eligibility could not under any circumstances raise an *ex post facto* claim. The Court distinguished statutes from other jurisdictions and simply stated that the issue had no merit. There has been no change in Illinois law since 1980, and the personnel on the Fifth District of the Illinois Appellate Court are precisely the same today as when *Harris* was decided. Thus recourse to state court would be futile for Petitioner. If the judges on the Fifth District of the Illinois Appellate Court were inclined to reconsider the issue, they would still be faced with the decision of the

Court of Appeals in *Heirens* v. *Mizell*, 729 F.2d 449 (7th Cir. 1984), *cert. denied*, 469 U.S. 842 (1984) which makes a change in the state court's decision even less likely.

The rejection of the *ex post facto* claim in *Heirens* was based on a *factual* determination "that the 1972 Illinois legislation delineating the parole criteria to be considered subsequent to January 1, 1973, did not enact a change in the factors the Parole Board used in making its parole determinations, rather it merely codified the Board's prior practice and procedure," 729 F.2d at 463. Unlike the state court, the Seventh Circuit found that a statute which changed parole eligibility in a manner "disadvantageous to the offender" would operate as an *ex post facto* law, 729 F.2d at 459. This factual conclusion was reached, not on the basis of evidence presented in the district court, but by the Court of Appeals taking judicial notice of a magazine article written by a current member of the Illinois Parole Board, 729 F.2d at 459, n. 6, 460.

In the Seventh Circuit Petitioner argued that the factual conclusion reached in *Heirens* was incorrect. Moreover, this would certainly seem a matter which requires factual development through the presentation of evidence and is not an appropriate issue for either judicial notice nor recourse to magazine articles.

Thus the issue has been decided by the state court in a manner which forecloses a viable attack. The Seventh Circuit, however, decided the case on a factual basis without an adequate record in a manner Petitioner believes is subject to serious question.

The Court of Appeals was correct in *Welsh* v. *Mizell*, 668 F.2d 328, 329 (7th Cir. 1982), *cert. denied*, 459 U.S. 923 (1982) that further litigation of this claim in state court would be futile.

CONCLUSION

For the reasons specified in his briefs, Petitioner respectfully urges this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand this cause with directions to consider the merits of the petition.

Respectfully submitted,

HOWARD B. EISENBERG
(Appointed by this Court)
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901
(618) 536-4423

Attorney for Petitioner